

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 210

THE OHIO PUBLIC SERVICE COMPANY,
PLAINTIFF IN ERROR,

vs

THE STATE OF OHIO EX REL. JOSEPH O. FRITZ,
PROSECUTING ATTORNEY OF WAYNE COUNTY,
OHIO

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

FILED AUGUST 27, 1926

(31,433)



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[fol. 1] Return to writ of error omitted in printing.

[fol. 2] **IN SUPREME COURT OF OHIO**

No. 18784

THE OHIO PUBLIC SERVICE COMPANY, Petitioner,

vs.

STATE OF OHIO ex Rel. JOSEPH O. FRITZ, Prosecuting Attorney of Wayne County, Ohio, Respondent

PETITION FOR WRIT OF ERROR—Filed July 27, 1925

To the Honorable Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio:

Your petitioner, The Ohio Public Service Company, a corporation created, organized and existing under the laws of the State of Ohio, respectfully says that on or about the 2nd day of June, A. D. 1925, the Supreme Court of Ohio made and entered a final order and judgment herein in favor of the State of Ohio ex rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, and against your petitioner, in which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear by the record of the proceedings in said cause, and from the assignment of errors which is filed with this petition.

That said Supreme Court of the State of Ohio is the highest court of the said State of Ohio in which a decision [fol. 3] in this suit and in this matter could be had.

That this suit or cause was one in which the State of Ohio ex rel. Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, sought to oust your petitioner from its franchises, grants and rights in the use and enjoyment of the public streets, lanes, alleys, avenues, parks and public places of the Village of Orville, being a municipal corporation of the State of Ohio located in Wayne County,

State of Ohio, for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said Village of Orrville with electricity for commercial and private lighting purposes.

That in said suit or cause your petitioner for answer therein alleged that it was a corporation organized under the laws of the State of Ohio, and was duly authorized and empowered to generate, transmit and distribute electricity in various communities in the State of Ohio, including said Village of Orrville; that at the time of the filing of the petition it owned and was using and exercising certain franchises, rights and privileges for the distribution of electricity in said Village of Orrville, granted to it and to its predecessors in title by the State of Ohio, under a certain law of said State passed by the General Assembly thereof on the 26th day of January, 1887 (84 O. L. 7), and entitled "An Act to Supplement Sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio"; that said franchises, grants and rights had been used and enjoyed by your petitioner and its predecessors in title for a period of thirty years for the furnishing of electricity to said Village and the inhabitants thereof; that your petitioner and its predecessors had expended large sums of money in the construction of electrical equipment in the said Village for furnishing of such service; that the mode and manner of the use of the streets, alleys, lanes, squares and public places in said Village by the equipment necessary [fol. 4] for said service was agreed and consented to by the authorities of said village; that said franchises, grants and rights to generate and distribute electricity in said Village of Orrville were perpetual in duration; that they were not terminable or revocable, nor subject to annulment at the will of said state nor of said village, and in particular that the ordinance and resolution of the village of Orrville, Ohio, passed by its council on or about the 18th day of June, 1923, which undertook to terminate and annul said franchises grants and rights of your petitioner were without warrant or authority in law, and in violation of and repugnant to the Constitution of the United States of America, and especially of Section 10 of Article I thereof, and Section 1 of the 14th Amendment thereof.

That the said Supreme Court of the State of Ohio in said final order and judgment adjudged and decided that said franchises, grants and rights to distribute electricity in said Village of Orrville, Ohio, as aforesaid, were revoked and annulled by said ordinance and resolution of the said Village of Orrville, under authority of certain act passed by the General Assembly of the State of Ohio on April 21, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio," (92 O. L., 206); and further, that said Act of April 21, 1896, of itself and without action by the Council of said Village, revoked and annulled said franchises, grants and rights of your petitioner in said Village, and it was adjudged by said Supreme Court by its said final order and judgment herein that said ordinance and resolution of June 18, 1923, of the Village of Orrville and said Act of April 21, 1896, of the General Assembly of the State of Ohio, as interpreted by said Court, were not in violation of nor repugnant to the provisions of Section 10 of Article I of the Constitution of the United States of America, nor of Section 1 of the 14th Amendment thereof.

[fol. 5] That the interpretation and construction put upon said Act of April 21, 1896, by the Supreme Court of Ohio, in holding and deciding herein that the franchises, grants and rights of your petitioner were revoked and annulled by said Act and the authority delegated therein, is in conflict with and contrary to the previous interpretation and construction of said Act by said Supreme Court of the State of Ohio in the case of the Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky, (93 O. S., 428), as affirmed by the Supreme Court of the United States (251 U. S., 173). That your petitioner, relying upon said former interpretation and construction of said Act of April 21, 1896, did, after the decision in the said Hardin-Wyandot case, on or about the 29th day of October, 1921, purchase the said electrical plant in the Village of Orrville, and said franchises, grants and rights to distribute electricity therein. That said present interpretation of said Act by the Supreme Court of the State of Ohio is in violation of and repugnant to the Constitution of the United States of America, and especially of Section 10 of Article I thereof, and Section 1 of the 14th Amendment thereof.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in its

behalf to the Supreme Court of the State of Ohio to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this 20th day of July, 1925.

C. H. Henkel and Franklin L. Maier, Attorneys for
the Ohio Public Service Company, Petitioner. Of
Counsel: Squire, Sanders Dempsey.

[fol. 6] The writ of error as prayed for in the foregoing petition is hereby allowed this 27th day of July, 1925, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of \$10,000.00.

Carrington T. Marshall, Chief Justice of Supreme
Court of the State of Ohio.

Dated at the City of Columbus, Ohio, this 27th day of
July, 1925.

[fol. 7] [File endorsement omitted]

[fol. 8] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 27, 1925

Now comes the petitioner, in connection with the petition for writ of error herein, and respectfully submits that in the record, proceedings, decision, final order and judgment of the supreme court of the State of Ohio in the above entitled action there is manifest error in this, to-wit:

1. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Wayne County, Ohio, and in refusing to reverse said judgment and remand this cause to said Court for further proceedings.

2. The judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, which prohibits any state from passing any law impairing the obligation of contracts.

[fol. 9] 3. The judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 1 of the 14th Amendment to the Constitution of the United States which declares that no state shall deprive any person of property without due process of law.

4. The Supreme Court of Ohio erred in holding that the franchises, grants and rights of your petitioner and its predecessors in title acquired from the State of Ohio under an Act of the Legislature of the State of Ohio passed on the 26th day of January, 1887, entitled "An Act to Supplement Sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio" (84 O. L., 7) were revoked, annulled and canceled by the Act of the Legislature of said state passed on the 21st day of April, 1896, entitled, "An Act to Amend Section 3471-a of the Revised Statutes of Ohio" (92 O. L., 206), in violation of and in conflict with the inhibitions of Section 10 of Article I of the Constitution of the United States with respect to the impairment of contract rights and of Section 1 of Article XIV of the Amendments thereto in regard to depriving any person of his property without due process of law.

5. The Supreme Court of the State of Ohio erred in holding that the franchises, grants and rights of your petitioner and predecessors in title to distribute electricity in said Village of Orrville, Ohio, were revoked, annulled and canceled by the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, under the authority of the provisions of said Act of April 21, 1896,—contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States and of Section 1 of Article XIV of the amendments thereto.

6. The Supreme Court of Ohio erred in holding that the [fol. 10] franchise, grant and right of your petitioner acquired from the State of Ohio under said Act of the Legis-

lature of said State passed January 26, 1887, above referred to, and the amendments thereto, was revoked, annulled and cancelled by the Act of the Legislature of said State passed on the 21st day of April, 1896, and above referred to, and also in holding that said Act of April 21, 1896, conferred upon the Council of the Village of Orrville authority to cancel and annul said franchise, grant and right of your petitioner by the passage of the resolution and ordinance of June 18, 1923, all in violation of and in conflict with the inhibitions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article 14 of the Amendments thereto.

7. The Supreme Court of the State of Ohio erred in giving effect to Legislative enactments of the State of Ohio and of said Village of Orrville, Ohio, which impair the obligation of the contract rights of your petitioner, contrary to the inhibitions of Section 10, Article I of the Constitution of the United States, and which deprive your petitioner of its property without due process of law, contrary to the inhibitions of Section 1 of Article XIV of the amendments thereto.

8. The Supreme Court of the State of Ohio erred in rendering said final judgment in that it impaired the obligation of the contract made between the State of Ohio and The Orrville Light, Heat & Power Company, the predecessor in title of your petitioner, under and pursuant to said Act of January 26, 1887, granting to said Company the franchise and right to use the public streets of the Village of Orrville for the transaction of the business for which it was incorporated to furnish electric light, heat and power to said Village and its inhabitants, and the consent and agreement by the authorities of the Village of Orrville, Ohio, as expressed in the ordinance of February 1, 1892, [fol. 11] relative to the mode and manner of the use of streets, alleys, lanes, squares and public places in said Village by the equipment necessary for said service, which contract, grant, franchise and right was acquired for a valuable consideration by your petitioner in 1921, and is now owned by your petitioner—contrary to and in violation of the provisions of Section 10 of Article I of the Constitu-

tion of the United States, and of Section 1 of Article XIV and amendments thereto.

9. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as revoking and annulling the grants, franchises and rights granted by the State of Ohio to your petitioner, and to The Orrville Light, Heat & Power Company, under the provisions of the Act of said Legislature passed January 26, 1887, such interpretation being in conflict with and contrary to a previous interpretation of said Act by the said Supreme Court of the State of Ohio in the case pending therein entitled "The Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky," (93 O. S., 428), decided February 15, 1916, by said court, and which decision was affirmed by the Supreme Court of the United States on December 15, 1919, (251 U. S., 173), in that your petitioner, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville and said franchise, grant and right of said The Orrville Light, Heat & Power Company: contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article XIV of Amendments thereof.

10. The Supreme Court of the State of Ohio erred in interpreting said Act of April 21, 1896, as giving authority to the Village of Orrville to cancel, revoke and annul by [fol. 12] the passage of said resolution or said ordinance by its Council on June 18, 1923, the contract rights and franchises of your petitioner and of its predecessor in title, The Orrville Light, Heat & Power Company, granted by the State of Ohio under the Act of January 26, 1887, such interpretation being contrary to and in conflict with a former decision of said Supreme Court of the State of Ohio in the case of The Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky, (93 O. S., 428), decided February 15, 1916, and the affirmance thereof by the Supreme Court of the United States on December 15, 1919 (251 U. S., 173), in that your petitioner, relying upon said former interpretation and its performance by the Supreme Court of the United States, did on or about the 29th day

of October, 1921, purchase said electrical plant in the Village of Orrville and said franchise, grants and right of said The Orrville Light, Heat & Power Company; contrary to and in violation of the provisions of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV and amendments thereof.

11. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the Act of the Legislature of said State passed on the 21st day of April, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio," impaired the obligations of the contract, namely the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article Fourteen of the Amendments thereto.

12. The Supreme Court of the State of Ohio erred in refusing to hold and decide that the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grant and right of your petitioner acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887, and was and is in violation of and in conflict [fol. 13] with Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments thereto.

C. H. Henkel and Franklin L. Maier, Attorneys for
Petitioner. Of Counsel: Squire, Sanders & Dempsey.

[fol. 14] [File endorsement omitted.]

[fol. 15]

IN SUPREME COURT OF OHIO

[Title omitted]

WRIT OF ERROR—Filed July 27, 1925

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme — of the State of Ohio, before you or some of you, being the highest court of law or equity of said state in which decision could be had in the said suit between The Ohio Public Service Company, and State of Ohio ex rel Joseph O. Fritz, Prosecuting Attorney of Wayne County, Ohio, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto, and said decision was in favor of such, its validity, and said decision of the Supreme Court of Ohio gave a construction relative to such statute at variance with the former decisions of the Supreme Court of the United States of America; and said decision of the Supreme Court of the State of Ohio was against the title, right, privilege and immunity claimed under the Constitution of the United States and the amendments thereto; and by reason of said decision a manifest error hath happened, to the great damage of the said The Ohio Public [fol. 16] Service Company as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 26th day of August, 1925, in the said Supreme Court of the United States, to

be then and there held that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States the 27th day of July, in the year of our Lord, 1925.

B. E. Dilley, Clerk of the United States District Court for the Southern District of Ohio, Eastern Division. (Seal of the United States District Court, Southern District Ohio.)

Allowed by Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[File endorsement omitted.]

[fols. 17-19] Citation, in usual form, showing service on L. R. Critchfield et al., filed July 30, 1925; omitted in printing.

[fols. 20-23] Bond on writ of error for \$10,000, approved and filed July 27, 1925; omitted in printing.

[fol. 24] IN SUPREME COURT OF OHIO

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed July 27, 1925

To the Clerk:

You are hereby directed to prepare a transcript of, certify and transmit to the Clerk of the Supreme Court of the United States the entire record in this cause, together with all pleadings and papers filed in this Court.

P. H. Henkel and Franklin L. Maier, Attorneys for Plaintiff in Error.

Columbus, Ohio, July 27, 1925.

See precipe filed Aug. 7th, which supersedes this one.
S. H. Miller, Clerk.

[fol. 25] IN SUPREME COURT OF OHIO

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 7, 1925

To the Clerk:

You are hereby directed to prepare a transcript of, certify and transmit to the Clerk of the Supreme Court of the United States the entire record in this cause, together with all pleadings and papers filed in this court excepting the following: Exhibits A, C, D, G, N, O, P, Q, R, X and Z, and Relator's Exhibit One (1).

P. H. Henkel and Franklin L. Maier, Attorneys for Plaintiff in Error. Of Counsel: Squire, Saunders & Dempsey.

Service of the foregoing by copy acknowledged this 3rd day of August, A. D. 1925, at Wooster, Ohio.

L. R. Critchfield, and Alton H. Etling, Attorneys for Defendant in Error.

[fol. 26] [File endorsement omitted.]

[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET ENTRIES

1924.

Sept. 25. Petition in error (as of right) transcript of docket and journal entries, original papers, and prieve for summons filed.

“ “ Summons issued for defendant, to Sheriff of Wayne County, returnable October 6, 1924, Sent by registered mail P. O. receipt No. 75872.

“ 30. Court of Appeals original papers, bill of exceptions and exhibits filed.

“ “ Papers sent to H. J. Chittenden Co. by express.

- Oct. 2. Motion by plaintiff to dispense with printing of exhibits and acknowledgment, filed.
- “ 4. Summons returned and filed, endorsed “Sheriff’s Return State of Ohio, Wayne Co. Received this writ Sept. 26, 1924 at 10 o’clock A. M. and on Sept. 29, 1924, I served the within named Joseph O. Fritz, Pros. Atty, and on Oct. 2, 1924. I served L. R. Critchfield, Atty., and A. H. Etling, atty., by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. Fees \$1.53. Andrew W. Bucher, Sheriff.”
- “ 14. Motion by plaintiff to dispense with printing exhibits. Allowed—J. 30-101.
- “ 22. Papers returned by H. J. Chittenden Co.
- “ “ Printed record and affidavit as to service filed.
- “ 27. Plaintiff printed briefs filed 10/29/24. Proof and service filed.
- Nov. 24. Printed briefs of defendant filed and proof and service filed.
- [fol. 28]
- Dec. 13. Order extending time for filing printed reply brief of plaintiff to Dec. 29, 1924. J. 30-153.
- “ 29. Reply brief of Plaintiff and proof of service filed.
- 1925.
- June 2. Judgment affirmed. J. 30-283.
- “ 9. Original papers and Bill of Exceptions sent to clerk.
- “ 17. Mandate issued.
- “ 29. Application for rehearing by plaintiff in error filed.
- July 27. Petition for Writ of Error from United States Supreme Court to Supreme Court of Ohio, allowed by Marshall, C. J. filed.
- “ “ Assignment of Errors filed.
- “ “ Citation for defendant issued to Sheriff of Wayne County.
- “ “ Precipe for record filed.
- “ “ Writ of Error filed and two copies lodged for Clerk and defendant.

- July 27. Bond for \$10,000. Signed by plaintiff in Error as principal and by America- Surety Co. of N. Y. as surety filed.
 as surety filed.
 “ “ Duplicate copy of bond filed.
 “ 30. Citation and Return of Service on defendant filed.
 Aug. 7. Precipe of Plaintiff in Error as to transcript (to replace precipe heretofore filed) filed.
 “ 11. Original Papers, bill of exceptions & exhibits received from Clerk of Courts of Wayne County.

[fols. 29-31] IN SUPREME COURT OF OHIO

[Title omitted]

JOURNAL ENTRIES

1924.

- Oct. 14. “Motion by plaintiff to dispense with printing exhibit. It is ordered by the Court that this motion be and the same is hereby allowed.” Journal 30-101.
 Dec. 13. “Error to the Court of Appeals Wayne County. It is hereby ordered that the time for filing printed reply brief of plaintiff in error be extended to Dec. 29, 1924.” Journal 30-153.

1925.

- June 2. Error to the Court of Appeals of Wayne County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Wayne County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the Judgment of the said Court of Appeals be and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error his costs herein

expended, taxed at \$—. Ordered, that a special mandate be sent to the Common Pleas Court of Wayne County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Wayne County "for entry." Journal 30-283.

[fol. 32]

IN SUPREME COURT OF OHIO

[Title omitted]

PETITION—Filed Sept. 25th, 1924

Now comes The Ohio Public Service Company as plaintiff in error and for petition in error herein complains of the State of Ohio on relation of Joseph O. Fritz as Prosecuting Attorney, defendant in error, in that said defendant in error at the April term 1924 of the Court of Appeals, in and for the county of Wayne, State of Ohio, recovered a judgment by the consideration of said Court of Appeals against the plaintiff in error in a certain action or proceeding [fol. 33] ing in quo warranto then pending in said court, wherein the plaintiff in error was defendant and the defendant in error was plaintiff. A copy of said records and proceedings, together with the original pleadings, papers, bill of exceptions and transcript of the docket and journal entries therein duly certified, are filed herewith and made a part of this petition in error.

Said Court of Appeals of Wayne County, Ohio, had original jurisdiction in said action and proceeding in quo warranto and the said cause also involved questions arising under the Constitutions of the United States and of the State of Ohio.

Plaintiff in error avers that there is manifest error in said record and proceedings in said Court of Appeals, prejudicial to said plaintiff in error in this, to-wit:

1st. Because the finding, decision, judgment of the court is not sustained by sufficient evidence.

2nd. Because said finding, decision and judgment are contrary to law.

3rd. Because said finding, decision and judgment of the court constitutes a violation or contravention of the provisions of the Constitution of the State of Ohio and of the Constitution of the United States of America.

4th. The Court erred in excluding evidence offered by the defendant, now plaintiff in error, to which said defendant duly excepted.

5th. The court erred in admitting certain evidence offered by the plaintiff, now defendant in error, on the trial of said cause, against the objection of the defendant, now plaintiff [fol. 34] in error, and to which action of the court the said defendant below, excepted.

6th. The court erred in overruling defendant's motion for new trial, to which action of the court the defendant duly excepted.

7th. Because the finding, decision and judgment of the court were in favor of the plaintiff when the same should have been in favor of the defendant.

8th. Other errors apparent upon the face of the record.

Wherefore plaintiff in error prays that said judgment of said Court of Appeals may be reversed and that final judgment may be entered herein in favor of the plaintiff in error, and that the judgment of ouster may be vacated and that the defendant herein be adjudged entitled to the exercise of the rights and franchises heretofore used and enjoyed by it, and that plaintiff in error may be restored to all things which it has lost by reason of said judgment of the Court of Appeals, and to recover of the defendant in error its costs herein expended.

The Ohio Public Service Company, Plaintiff in Error,
by Franklin L. Maier, C. H. Henkel, Its Attorneys.

[fol. 35] IN THE COURT OF APPEALS OF WAYNE COUNTY
No. 762

THE STATE OF OHIO ON Relation of JOSEPH O. FRITZ, Prosecuting Attorney of Wayne County, State of Ohio, Plaintiff,

vs.

THE OHIO PUBLIC SERVICE COMPANY, a Corporation,
Defendant.

PETITION—Filed July 21st, 1923.

The Relator says that he is the duly qualified and acting Prosecuting Attorney of said County of Wayne and State of Ohio; that the defendant is a corporation organized under the laws of the State of Ohio, with a place of business located in the Village of Orrville, said Wayne County, State of Ohio; that the said Village of Orrville is a municipal corporation located in said county of Wayne and State of Ohio; that the said Relator brings this action on behalf of said The State of Ohio, and says:

That the defendant, The Ohio Public Service Company, has taken charge and possession of, as if right, and is now using the public streets, lanes, alleys, avenues, parks and [fol. 36] public places of said Village of Orrville, for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the purpose of supplying private individuals, firms and corporations of said Village with electricity for commercial and private lighting purposes, and charging and receiving pay for said electricity so furnished.

That said defendant has assumed and used, and is now using, the said franchise rights and privileges, as above enumerated, the same not having been granted to it by any lawful authority, and without the consent or authority of the plaintiff, The State of Ohio, nor/or said, The Village of Orrville.

Wherefore, the plaintiff prays that said defendant be compelled to answer to the state authority, by what warrant it claims to use and enjoy the liberties, privileges

and franchises aforesaid; and that it be ousted from using the same.

Joseph O. Fritz, Prosecuting Attorney of Wayne County, State of Ohio. Alton H. Etling, Attorney for Plaintiff. L. R. Critchfield, Attorney for Plaintiff.

[fol. 37] IN COURT OF APPEALS OF WAYNE COUNTY

ANSWER—Filed August 18th, 1923

Now comes the respondent, The Ohio Public Service Company, and for answer to the petition herein filed by the Prosecuting Attorney of the County of Wayne, State of Ohio, says:

That it is a corporation organized under the laws of the State of Ohio, duly authorized and empowered to transmit and distribute electrical energy or current in various communities and cities in the State of Ohio, including the Village of Orrville in said state.

That at the time of the filing of the petition herein and ever since its incorporation it has rendered a service to consumers in various communities including the Village of Orrville by virtue of the power and authority granted to it by the State of Ohio as set forth in its articles of incorporation.

That it is a public utility as defined by law and is and has been "engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state," and as stated in the said Village of Orrville.

That the Public Utilities Commission of Ohio authorized this respondent to issue certain securities including stocks and bonds, and recognized the right of this respondent as a public utility to engage in the business of supplying electricity in different communities, including the Village of Orrville, Ohio.

That this respondent did also file with the Public Utilities Commission of Ohio, as provided by law, an application for [fol. 38] authority to acquire the property of The Massillon Electric & Gas Company, which application and proceed-

ing was known as #2397 before said Commission, and that said Public Utilities Commission after a hearing, as provided by law, did, on or about October 12, 1921, authorize The Ohio Public Service Company to increase its capital stock and to issue its preferred stock and create a bonded indebtedness and to acquire all the property and the entire assets of The Massillon Electric & Gas Company; and the respondent did acquire all the property and assets of The Massillon Electric & Gas Company; and formal and legal transfers of all the property of The Massillon Electric & Gas Company, including all its rights, interests, privileges, grants, property and holdings, in the Village of Orrville, Ohio, were made, executed and delivered to The Ohio Public Service Company. And on or about the 29th day of October, 1921, The Ohio Public Service Company did obtain from The Massillon Electric & Gas Company, for a good and valuable consideration, all the right, title and interest of The Massillon Electric & Gas Company in and to certain franchises, rights and privileges in the Village of Orrville, Wayne County, Ohio, and especially all right, title and interest in and to the franchise granted to Ansel P. Gans and Melville D. Wilson, their associates and assigns on February 1st, 1892, by the Council of said Village.

This respondent further says that since the acquisition of such rights, privileges and property it has used and enjoyed the same and has continued to serve the consumers in said community without any protest or complaint made [fol. 39] to The Public Utilities Commission of Ohio or any other complaint or interference by the said municipality, the Village of Orrville, Ohio, or the inhabitants thereof, other than that hereinafter set forth. That the respondent and its predecessors have at all times since February 1st, 1892, used and enjoyed all the rights, privileges and franchises under and created by an ordinance passed by the Village of Orrville on February 1st, 1892, granting to the said Ansel P. Gans and Melville D. Wilson, their associates and assigns, the right to use the streets, lanes, alleys and avenues of said Village "for the purpose of erecting, maintaining electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

The respondent says that The Massillon Electric & Gas Company was a corporation organized under the laws of the State of Ohio and a public utility operating therein, as provided by law, and that the said The Massillon Electric & Gas Company did furnish service to the said Village of Orrville, Ohio, and the inhabitants thereof prior to October 29, 1921, and that said Village of Orrville, Ohio, did recognize the rights of The Massillon Electric & Gas Company to so operate in said Village and to use the streets, alleys, lanes and public grounds of said Village for such purposes.

And this respondent further avers that on or about September 25, 1912, the said The Massillon Electric and Gas Company did file a joint application with The Orrville Light, Heat & Power Company, as provided by law, with the Public Utilities Commission of Ohio, asking for the [fol. 40] purchase and sale of the property of The Orrville Light, Heat and Power Company, which consisted of all the necessary poles, wires, equipment and machinery for the operation of a light, heat and power plant in the Village of Orrville, Ohio; and that the The Public Utilities Commission of Ohio did make an order on or about the 23rd day of October, 1912, authorizing the Orrville Light, Heat & Power Company to sell and The Massillon Electric & Gas Company to purchase said plant of The Orrville Light, Heat & Power Company and all the assets and the entire property thereof, including all privileges, rights, grants and franchises; and in accordance therewith one D. I. Rennecker, on behalf of and as the successor to The Orrville Light Heat & Power Company, by formal and legal transfer did convey to The Massillon Electric & Gas Company all of the property and entire assets of the The Orrville Light Heat & Power Company, including franchises, rights and privileges, which deed of conveyance was executed, in conformity to the order of The Public Utilities Commission of Ohio, on the 11th day of March 1912, and which deed of conveyance was duly recorded in the deed records of Wayne County, Ohio, Volume 168 page 15 et seq. That the said D. I. Rennecker had received by proper deed of transfer all the property, right, franchises and assets of The Orrville Light, Heat & Power Company on July 1st, 1907; and that from said date until the transfer to The Massillon Electric & Gas

Company, the said D. I. Rennecker operated said property in the Village of Orrville, Ohio, under the name of The Orrville Light, Heat & Power Company; which deed [fol. 41] of conveyance was recorded in the deed records of Wayne County, Ohio, Volume 156 page 213 et seq.

The respondent further avers that prior to the 1st day of July, 1907, The Orrville Light, Heat & Power Company, a corporation organized under the laws of the State of Ohio, used and enjoyed the rights, grants, and privileges of said ordinance passed by the council of the Village of Orrville, Ohio, on February 1st, 1892, and was engaged in distributing electrical energy and current for light, heat and power purposes in said village. That said corporation was organized on January 3, 1893, and that said corporation acquired all the rights, interests and property of the said Ansel P. Gans and Melville D. Wilson, including all rights, grants and privileges under the ordinance passed by the Village of Orrville, Ohio, on February 1st, 1892.

That at various times after February 1st, 1892, the Village of Orrville, Ohio, did enter into contracts with the various parties and corporations hereinbefore referred to, for street lighting, and said Village of Orrville did at all times recognize the right of each party hereinbefore named to use and enjoy the streets, alleys, lanes and avenues of said Village for the distribution of electricity, or electrical energy, for light, heat and power purposes. That the use and enjoyment of said streets has, since 1892, been open and notorious and has been without objection or interference from the said Village or the officials thereof, other than that hereinafter set forth, and that the respondent and its predecessors have always enjoyed the rights, privileges and franchises of using said streets. And are still entitled [fol. 42] to the right to use and enjoy all of such privileges, grants and franchises.

The respondent further avers that section I of said ordinance passed by the Council of the Village of Orrville, Ohio, on February 1st, 1892, provided as follows:

“That Ansel P. Gans and Melville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville, Ohio, for the purpose of erecting, maintaining, electric wire mains, and

apparatus complete for the distribution of electricity for light, heat and power."

That as averred the said Gans and Wilson and their successors from and after said first day of February, 1892, and up to the time of the filing of the petition herein, and now have and are using and enjoying all the rights, grants and privileges under said franchise and ordinance. That said ordinance has not been legally repealed and said section has not been legally modified or amended and is still in full force and effect. That such ordinance created a contractual relation between said Village and this respondent and its predecessors. That the rights existing under and arising from such ordinance and contractual relation are of great value. That this respondent and its predecessors, relying upon such ordinance and contractual rights, expended large sums of money in the erection, construction, maintenance and operation of its lines, apparatus, equipment, etc., in said Village or Orrville.

[fol. 43] That said Village of Orrville, Ohio, has not in any legal manner (notwithstanding its attempted action) terminated said grant and has not fixed or determined the period for which the same was allowed, but has at all times permitted the said Gans and Wilson and their successors to use and enjoy the same, and that the said Gans and Wilson and their successors have at all times continued in the use and enjoyment thereof and have not terminated the same.

The respondent further avers that The Massillon Electric & Gas Company brought an action in the Common Pleas Court of Wayne County, Ohio, being cause #24440 against the Village of Orrville, Ohio, and certain officials thereof, seeking to permanently enjoin the defendant from operating a municipal electric light plant. That, in said action, the Village of Orrville filed an answer in which it recognized that the plaintiff had certain property in said Village which it was using for light and power purposes; this cause was carried to the Court of Appeals of Wayne County, Ohio, and was there known as cause # 637. The Court of Appeals recognized that The Massillon Electric & Gas Company, the predecessor of the respondent, was operating in said village with authority. The said Village did not in any way question the right or

authority of said predecessor of the respondent to so operate as a company distributing electricity and electrical energy for heat, light and power purposes.

The Massillon Electric & Gas Company commenced another proceeding in the Common Pleas Court of Wayne County, Ohio, wherein The Massillon Electric & Gas [fol. 44] Company, as a taxpayer, was plaintiff, and the Village of Orrville, et al., were defendants, which cause was #24458. Plaintiff averred that it owned and operated an electric works and plant in said Village and that it had supplied electricity for light and power purposes in said Village, both for public and private use; that the Village of Orrville filed an answer in said cause in which it admitted that the said The Massillon Electric & Gas Company was engaged in business in the Village of Orrville. Said cause was taken to the Court of Appeals, Wayne County, Ohio, and was there known as cause #638. The Court of Appeals of Wayne County, Ohio, found that The Massillon Electric & Gas Company was the owner of a plant in said Village and operated same under a franchise granted by said Village, and further found "no defense is made that the franchise has terminated."

The respondent further avers that the Dravo-Doyle Company brought an action against The Village of Orrville, in the Court of Common Pleas, Wayne County, Ohio, being cause #24618. The said Village filed an answer therein referring to cause #24440 commenced March 12th, 1914, and made a part of its answer the decree of the Court of Appeals in cause #637 and also referred to cause #24458 commenced on or about April 3rd, 1914, and made a part of its pleading a copy of the decree of the Court of Appeals in #638. And further averred that "The Massillon Electric & Gas Company, did in fact own and was operating an electric light plant in said Village of Orrville under a franchise duly granted to it, and that said franchise had not then expired, and that said The Massillon Electric & Gas [fol. 45] Company was then supplying from said plant electricity to the Village of Orrville and the inhabitants thereof for light and power purposes, both public and private."

That this cause was finally taken to the Supreme Court of Ohio, being cause #14917 in said court, and said court in announcing its decision recognized that The Massillon Electric & Gas Company had certain rights and that "on July

21st, 1913, and prior thereto The Electric & Gas Company, an Ohio corporation, owned an electric light plant in the Village and was furnishing electricity to said Village and the inhabitants thereof for both public and private light under a franchise granted by said Village in 1892, and such franchise had not yet expired.

The Supreme Court also found "a franchise was granted in 1892 and fixed the contractual rights and duties of the parties."

Respondent further avers that it has certain fixed and valuable rights in said Village and that it has expended large sums of money in attempting to provide a service for the said Village and the inhabitants thereof and that its contractual, franchise and other rights have never been legally terminated, abandoned, relinquished or legally annulled, and that it is entitled to the full use and enjoyment of all the same.

Respondent further avers that on or about the 18th day of June, 1923, the Village, through its Council, attempted to repeal said ordinance of Feb. 1, 1892, and on the same date caused a resolution to be passed by said Village Council notifying The Ohio Public Service Company of the attempted termination of said franchise and directing it to remove all of its poles, wires, guy wires, cross arms, insulators and other electrical equipment occupying the streets, lanes, alleys, avenues and public places of said Village within thirty days from the receipt of a copy of said resolution, and it was directed therein that said resolution be served upon the respondent herein by the Mayor of said Village of Orrville.

Respondent further says that the action of said Village Council in attempting to annul said ordinance is wholly unauthorized and illegal, and was passed by said Village for the purpose of forcing the plaintiff from the streets and other public places of said municipality and to thus eliminate said respondent as a competitor of the municipally operated electric lighting plant of said Village.

This respondent avers that it has certain fixed and valuable rights in said Village and that it has expended large sums of money in attempting to provide a service for the said Village and the inhabitants thereof, and that its contractual, franchise and other rights have never been termi-

nated, abandoned, relinquished or annulled, and that it is entitled to the full use and enjoyment of all of the same.

That the action of the State of Ohio and the Village of Orrville to deprive respondent from further use and enjoyment of its rights and to oust it from the enjoyment thereof, will impair the obligation of the contract and grant of February 1st, 1892, and destroy and make worthless the value of respondent's property used and useful for furnish-[fol. 47] ing electricity for light, heat and power purposes in said Village. That the action so attempted by the State of Ohio and the Village of Orrville is without authority of law and violative of the provisions of the Constitution of the State of Ohio, and especially Article I, Section Nineteen thereof, and Article II, Section Twenty-eight thereof, and of the Constitution of the United States of America, and especially Article I, Section Ten thereof, and Section One of the Fourteenth Amendment thereto.

Wherefore respondent says that it does not usurp or without warrant or authority use or exercise any of said franchises, rights and privileges, but avers that the same have been granted to it by lawful authority and have been exercised by it with the consent and recognition and authority of the State of Ohio and the Village of Orrville, and the attempted action on the part of said Village was without warrant or authority in law and as herein averred violative of law and Constitutional provisions, and respondent asks that the petition herein be dismissed and that it be protected in its rights and the use and enjoyment thereof and that it recover its costs herein and for such other relief as may be just and right in the premises.

The Ohio Public Service Company, by Carl Henkel
and Franklin L. Maier, Attorneys.

(Duly verified.)

[fol. 48] IN COURT OF APPEALS OF WAYNE COUNTY

REPLY—Filed January 28, 1924

Now comes the Relator and for reply to the answer of the respondent says:

That he admits the allegations of the second paragraph of said answer of the respondent, but denies that the or-

ganization of said corporation, or the authorization as set forth in said paragraph, gives to the respondent any franchise rights as claimed by the respondent, in said Village of Orrville.

The Relator further admits the allegations of the third paragraph of the answer of the respondent, but denies that any such service rendered by virtue of the power and authority granted by the State of Ohio gives to the respondent any franchise rights in said Village of Orrville, Ohio.

The Relator admits the allegations of the fourth paragraph of said answer.

The Relator admits the allegations of the fifth paragraph of said answer relative to the issuing of certain securities, but denies that by virtue of the facts stated in said fifth paragraph, the respondent acquired any franchise rights in said Village of Orrville, Ohio.

The Relator further admits the allegations of paragraph 6 of the respondent's answer relative to an application for authority to acquire the property of The Massillon Electric and Gas Company; but denies that respondent obtained all the right, title and interest in and to the franchise granted to said Ansel P. Gans and Melville D. Wilson, their associates and assigns; and further says that if they did acquire such alleged rights as set forth in said 6th paragraph, that by virtue of said acquisition, said The Massillon Electric and Gas Company had no franchise rights in said village to transfer to respondent at the date of said alleged acquisition and respondent has now no franchise rights as claimed in said paragraph 6 by the respondent, in the Village of Orrville, Ohio.

The Relator denies the allegations of the 7th paragraph of the answer of the respondent, and further says that at the time of and before the expiration of a certain contract ordinance by virtue of which one D. I. Rennecker entered into a contract with said Village of Orrville, Ohio, to furnish public and private lighting for said village up to July 15, 1917, the said Village of Orrville refused to enter into any contract with said The Massillon Electric and Gas Company for the furnishing of public or private lighting in said village after said July 15, 1917, and that by virtue of said refusal all contract rights between the said Village of Orrville, Ohio, and said D. I. Rennecker, alleged to have been assigned to the said The Massillon Electric and Gas Com-

pany were terminated, and that by virtue of said alleged contract theretofore existing between said village and said The Massillon Electric and Gas Company said The Massillon Electric and Gas Company no longer furnished public lighting to said Village of Orrville; the consideration as recited in said franchise as granted February 1st, 1892, by [fol. 50] which the said Gans and Wilson, their successors and assigns, had a right to use said streets, lanes, avenues and public places having failed.

And the Relator further says that if the respondent claims that the said The Massillon Electric and Gas Company became the assignee of the contract ordinance entered into by and between said Village of Orrville and one D. I. Rennecker, said contract ordinance to begin on July 15, 1912, and ending five years from said time, to-wit, on July 15, 1917, and if it is claimed that the said contract ordinance was granted and that the use of the streets under said contract ordinance was by virtue of said ordinance of February 1st, 1892, which defendant denies, then and in that event the said relator says that said The Massillon Electric and Gas Company violated and abandoned whatever contract or franchise rights were so obtained from said D. I. Rennecker by its failure to carry out and fulfill the conditions of said franchise of February 1st, 1892, or said contract ordinance of July 15, 1912, in that it failed to supply current and public lighting in accordance with either said last mentioned contract ordinance, or said franchise of February 1st, 1892; that both said ordinances provided for the manufacture and supply of electricity from a plant located within the said Village of Orrville, Ohio, and that said The Massillon Electric and Gas Company abandoned said manufacturing plant in said village and conducted or attempted to conduct electricity into said village from outside said village, as hereinafter stated; that by reason thereof the service furnished by said The Massillon Electric and Gas Company was unsatisfactory and inefficient and in violation of the terms of said contract ordinance granted said D. I. Rennecker as well as of the said franchise of February 1st, 1892; that on account of the violation of the terms of said contract ordinance and said franchise, said village refused to enter into the contract for the supplying of any lighting, public or private, in said Village of Orrville to begin after said July 15th, 1917; and that the use of the streets, lanes, alleys,

avenues and public places of said Village of Orrville by said The Massillon Electric and Gas Company and respondent for the distribution of electric current, either public or private, has been in violation of the terms and conditions of said contract ordinance and said franchise without any right or authority to either said The Massillon Electric and Gas Company or respondent whatsoever except the mere sufferance of said Village of Orrville.

As to the 8th paragraph of respondent's answer, Relator denies that the said The Massillon Electric and Gas Company furnished service to said Village of Orrville, Ohio, prior to October 29, 1921, and after July 15, 1917; and denies that the said The Massillon Electric and Gas Company furnished a service to the said Village of Orrville, or the inhabitants thereof, by virtue of any franchise or contract whatsoever, and further says that what service was rendered at any time by said The Massillon Electric and Gas Company was done by mere sufferance of said village.

The Relator for want of knowledge and information as to the allegations of the 9th paragraph of the respondent's [fol. 52] answer denies each and every allegation thereof and says that if said order was made by the Public Utilities Commisison, as therein alleged, that said Public Utilities Commission had no power to make the same and the same was null and void.

Relator for reply to paragraph 10 of said answer of the respondent says: That the said Orrville Light, Heat and Power Company used and enjoyed only the rights, grants and privileges granted to it by virtue of contracts entered into in 1902 and 1906 by and between the said Village of Orrville and said the Orrville Light, Heat and Power Company and the implied power granted under said contracts to use the streets, lanes, alleys and avenues and public places of said village for the purpose of carrying out said contracts; and the relator denies all the remaining allegations of said paragraph 10 in said answer.

As to the allegations of paragraph 11 of the respondent's answer, the Relator admits that at various times after February 1st, 1892, the Village of Orrville did enter into contracts with the various parties and corporations hereinbefore referred to, except said The Massillon Electric and Gas Company and respondent, for street lighting, but avers

that the last of said contracts expired on the 15th day of July, 1917. The relator denies that said Village of Orrville did at all times recognize the rights of each of the parties to said franchise of February 1st, 1892, to use and enjoy the streets, lanes, alleys and avenues of said village for the distribution of electricity. The Relator admits that the respondent and its predecessors had open and notorious [fol. 53] use and enjoyment of the streets of said village from 1892 to July 15, 1917, but avers that there was objection to the manner of service in said streets long prior to July 15, 1917, and after 1912, and that there was objection to use of said streets, after July 15, 1917. Relator further avers that the use of said streets, since July 15, 1902, has been without any express franchise rights so to do; and denies that respondent is still entitled to the right to use and enjoy all such privileges and rights and franchises.

As to paragraph 12 of said answer, the said Relator admits the section of the ordinance of February 1st, 1892, as set forth in said answer, and attaches hereto as a part of this said reply a full copy of said ordinance of February 1st, 1892, marked "Exhibit A", and makes the same a part hereof; and denies the remaining allegations of said paragraph 12, except that relator admits that such ordinance created a contractual relation between said Village of Orrville and said Gans and Wilson and their successors and assigns.

In reply to paragraph 13 of said answer the Relator denies each and every allegation of said paragraph 13.

The Relator replies to paragraphs 14, 15, 16, 17 and 18 of said Answer relating to causes of action numbers 24440, 637, 24458, 638, 24618 and 14917, says these causes of action were all concerning facts that existed or were alleged to exist prior to July 15, 1917, and that the petitions in all of said causes of action were filed before said date and in none of said cases was the question of the extent and [fol. 54] duration of said franchise of February 1st, 1892, specifically in issue, and that the duration and extent of said franchise has never been determined by any court within the State of Ohio, up to the present time.

The Relator says in reply to paragraph 19 of said Answer that he denies each and every allegation of said 19th paragraph.

Relator says in answer to paragraph 20 of said answer that on the 18th day of June, 1923, the Council of the Village of Orrville, Ohio, duly and legally passed an ordinance repealing said ordinance of February 1st, 1892, and said ordinance was duly and legally repealed on said date; and that on said same date said Council passed a resolution, being a notice to the Respondent herein of the termination of said franchise of February 1st, 1892, and to remove its poles, lines, wires, guy wires, cross arms and all electrical equipment from the streets, lanes, alleys, avenues and public places of the Village of Orrville, Ohio, and provided therein that a copy of said resolution be served upon said The Ohio Public Service Company by the Mayor of the Village of Orrville, and that on the 19th day of June, 1923, the Mayor of said Village, to-wit, E. L. Kinney, duly served a copy of said resolution upon the Respondent, The Ohio Public Service Company, that said resolution was duly and legally passed; that said resolution called upon Respondent to vacate said streets, lanes, alleys, avenues and public places of said Village within thirty (30) days from the service of a copy of said notice upon said Respondent, and [fol. 55] that in response thereto said Respondent refused, and does still refuse, to obey the orders of said Council as embodied in said resolution. A copy of said resolution, marked "Exhibit B," and a copy of said repealing ordinance, marked "Exhibit C," are each hereto attached to this Reply and made part thereof.

Relator further says that by virtue of said ordinance, Exhibit C, and said resolution, Exhibit B, said Council of said Village of Orrville legally elected to terminate, and did terminate, said ordinance of February 1st, 1892, and any and all contractual relations existing thereunder.

Relator says in reply to paragraph 21 of said Answer that he denies each and every allegation thereof.

In reply to paragraph 22 of said Answer the Relator says that he denies each and every allegation thereof.

As to paragraph 23 of said answer the Relator says he denies each and every allegation thereof.

In answer to paragraph 24 of said Answer the Relator says he denies each and every allegation thereof so far as the same are statements of fact, and says that said Re-

spondent has no rights in said Village of Orrville, as alleged in said paragraph 24.

The Relator further says in reply to the Answer of the Respondent that the said ordinance of February 1st, 1892, provided that the said Ansel P. Gans and Mellville D. Wilson, their successors and assigns should erect, maintain and operate an electric lighting plant for the manufacture [fol. 56] of electricity in said Village of Orrville, Ohio; that some time after the beginning of the last contract ordinance in 1912 and before July 15, 1917, the exact date thereof Relator does not know, the said The Massillon Electric and Gas Company abandoned the said electric lighting plant and dismantled the same and ceased thereafter to use the same; that at the filing of the petition in this case and at the present time said electric lighting plant is in a state of dilapidation, decay and abandonment, the windows broken out, the doors standing open and said building simply used as a storehouse for junk; that as the result of said abandonment of said electric lighting plant and ever since said abandonment the service to the people of Orrville, Ohio, has been poor, unsatisfactory and inefficient, that the street lights have gone off and out for periods longer or shorter and occurring at time unknown to the inhabitants of said Village, previous to the occurrence, causing great inconvenience and annoyance; that since the abandonment of said plant the said Respondent and its predecessor, The Massillon Electric and Gas Company, have attempted to conduct electricity into said Village of Orrville from a high tension voltage wire not running in or through said Village of Orrville, said high tension voltage wire being built for the purpose of conducting electricity from its source of manufacture in Massillon, Ohio, and later near the Ohio River, as Relator is informed, up to the City of Massillon, Ohio thence west through various and numerous villages, including Dalton, Smithville, Apple Creek, Wooster, Fredericksburg and Shreve and other towns; that the supply of [fol. 57] electricity to the Village of Orrville since the abandonment of said plant has been intermittent and uncertain; that during said period up to July 15, 1917, many complaints were made to said The Massillon Electric and Gas Company of its service and since to The Ohio Pub-

lie Service Company, concerning its service in the Village of Orrville and the supplying of electricity therein; that during the period of the last contract price ordinance, from 1912 to 1917, many deductions from the contract price to D. I. Rennecker and his alleged successor, The Massillon Electric and Gas Company, were made from its bills by the Village of Orrville, due to outages in its street lighting system.

The Relator says that by the abandonment of said electric manufacturing plant in the Village of Orrville by the said Respondent and the said The Massillon Electric and Gas Company, they have broken the terms of said contract, breached its conditions and forfeited all rights thereunder before and up to and at said July 15, 1917.

Relator further says in reply to said Answer that by the terms of said ordinance of February 1st, 1892, the consideration of the use of the streets, lanes, alleys, avenues and public places to said Gans and Wilson, their successors and assigns, was the furnishing of light to said Village of Orrville, Ohio, for the period of ten (10) years, as stated in said ordinance; that thereafter contracts were made at various times by other and independent contractors, the final contract of which expired on July 15, 1917; that the right of said Gans and Wilson, their successors and assigns, [fol. 58] to furnish and sell electricity to private consumers in said Village of Orrville was not specifically granted in said ordinance of February 1st, 1892, if granted at all, but that said right, if any existed, was ancillary to and a mere incident of the main right to light the streets of said Village of Orrville; that said right whatever it may be, if any, to furnish electricity to private consumers of said Village, and receive pay therefor, expired, by implication, with the expiration of the main right and contract to light the streets of said Village; that it was not contemplated by said Village of Orrville and said Gans and Wilson, their successors and assigns, and an independent right was being granted to said Gans and Wilson to use the streets of said Village for private lighting purposes but the only contemplation and agreement of parties, as afore stated, that is the right to furnish electricity to private consumers, was incidental and ancillary to the main right granted, that of public lighting.

The Relator for further reply to the Answer of the Respondent says that if the court should find that said ordinance of February 1st, 1892, did not expire by virtue of its own terms and the reasons above stated on July 15, 1902, or July 15, 1917, or that rights under the said ordinance were not violated and forfeited by the breach of said contract as hereinbefore stated and that Respondent had rights under said ordinance of February 1, 1892, and if the court should further find that said franchise of February 1st, 1892, did not contain within itself or fix the terms of its duration and that the same was indeterminate, then this Relator says that said ordinance was terminable at the [fol. 59] will of said Village of Orrville and Relator further says that on June 18, 1923, said Village of Orrville elected to terminate said franchise and all rights thereunder and proceeded to do so by virtue of the ordinance passed on said date repealing said ordinance of February 1st, 1892, and by virtue of said notice contained in said resolution of said date and the service of the same upon the Respondent herein, The Ohio Public Service Company, on July 19, 1923, as hereinbefore stated; and that by virtue of said resolution and said ordinance and notice Relator says said franchise has become null and void and the same is of no effect in law and confers no rights upon the said Respondent to further use the streets, lanes, alleys, avenues and public places of said Village of Orrville for the erection and maintenance of its poles, wires, guy wires, and electrical equipment for any purpose since said date of June 19, 1923.

The Relator further says in Reply to said Answer of the Respondent that he denies that at the time of the filing of this said action and at the present time that the Respondent has a large sum of money invested in said Village of Orrville, Ohio, in its poles, wires, cross arms, plant and electrical equipment and says the facts are that at the time of the filing of this petition the whole property of the Respondent in said Village of Orrville was in a state of dilapidation, decay and abandonment or partial abandonment; that its poles, wires, and equipment for public lighting has been absolutely abandoned since July 15, 1917, and that many of the poles used for said purpose have broken down [fol. 60] and have been taken away, that many of the said

poles have no equipment thereon, that many of said poles are leaning now and in a dangerous condition, the wires hanging from poles and the insulation on many such wires as now exist hanging in strips from one to two feet in length, that said wires that are remaining on said poles are in the way of and an obstruction to the wires that are in use by various telephone and electric companies in said Village, and that its whole system has become and is dangerous and a nuisance and the same should be abated as a nuisance, dangerous to the life and limb of the inhabitants of said Village; that said Respondent has but a very few private consumers in said Village, to the best knowledge and belief of the Relator not to exceed nine (9) or ten (10) customers for commercial and private purposes, who use a small amount of electricity; and not to exceed two residence homes in said Village; that an appraisal of the valuation of said property would show but a small investment at the present time; that the said former municipal electrical manufacturing plant, as afore stated, is in a state of dilapidation and worthless, but for its value as real estate and a small price for the small building thereon, independent of its use for manufacturing electricity; that the total value of money now invested by said Respondent in said Village of Orrville under any claimed right under the franchise of February 1st, 1892, or in any other way is but small, by virtue of the facts above stated.

Relator says that it denies each and every allegation of said Respondent's Answer not herein expressly admitted, qualified or denied.

[fol. 61] Wherefore, said Relator renews the prayer of his said petition without rewriting the same herein.

Joseph O. Fritz, Prosecuting Attorney, Wayne County, State of Ohio. Alton H. Etling, Attorney for Relator. L. R. Critchfield, Attorney for Relator.

EXHIBIT A TO REPLY

Vol. 1, pages 33-34-35-36

An Ordinance Providing for Electric Lights, Heat, and Motive Power in the Village of Orrville, Wayne County, Ohio

Be it ordained by the Council of the Village of Orrville, and it is hereby ordained:

Sec. 1. That Aurel P. Gans and Melville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power.

Sec. 2. Said Gans and Wilson, in the construction of their plant or in conducting their wires for the distribution of [fol. 62] electric current, shall not unnecessarily intercept or obstruct the passage of any street, alley, lane or avenue or other thoroughfare in said Village, crossing same shall not unnecessarily mutilate, cut or trim any tree or trees except for the safe conduct of said electric wires, and same shall be fully protected from any and all damages where such trimming is necessary to be done. Same shall erect said wires and poles not less than thirty feet long and placed in the ground at a sufficient depth to insure perfect safety.

Sec. 3. In consideration of the privileges hereby granted the said Gans and Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville, said lamps to burn and be lighted and extinguished according to what is known as "Moonlight Schedule", until 1 o'clock and in addition then to be lighted whenever the moon is obscured and on rainy and stormy nights, whenever same occurs outside the regular lighting hours.

Sec. 4. In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter-annually for said lighting a price equal to seventy-two (\$72.00) dollars per year [fol. 63] for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of said Gans and Wilson, their associates, successors and assigns; the total number of **lamps** thus supplied to be not less than twenty-five 2,000 candle power lamps—are light.

Sec. 5. Said Gans and Wilson shall commence work on said electric light plant after the passage of this ordinance at such time as to have same completed by May 1st, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled.

Sec. 6. The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans and Wilson to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville, for any loss of lighting occasioned thereby.

Sec. 7. Said Gans and Wilson agree to accept this ordinance and to notify the Council in writing of such acceptance within ten days from the passage hereof, which acceptance, together with the ordinance, shall constitute a contract, otherwise the Village shall be no longer bound thereby and said ordinance shall be void.

Sec. 8. All other ordinances heretofore passed pertaining [fol. 64] to and providing for electric lights, heat and motive power by means of electricity, and all ordinances granting franchise for the erection and operation of elec-

tric wire mains for the distribution of light, heat and motive power are hereby repealed.

Passed and adopted February 1, 1892.

M. R. Zell, Clerk. A. N. Brenneman, O. D. Braden,
J. W. Stansbury, Ordinance Committee.

EXHIBIT B TO REPLY

Resolution

Notice to the Ohio Public Service Company of termination of franchise granted February 1, 1892, to Aurel P. Gans and Melville D. Wilson, their associates, successors, and assigns, and to remove its poles, lines, and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues, and public places of the village of Orrville, Ohio.

The Council of the Village of Orrville, Ohio, not waiving their claim that said rights, privileges and franchises granted to Aurel P. Gans and Melville D. Wilson, their associates, successors and assigns, including The Ohio Public Service Company, ceased and terminated on the 15th day of July, 1917, and not waiving the claim of said Village of Orrville, that said associates, successors and assigns of said Gans and Wilson, including said The Ohio Public Service [fol. 65] ice Company, have forfeited all rights, privileges and franchises granted by an ordinance of the Village of Orrville, Ohio, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, by reason of the abandonment of said rights, privileges and franchises and by not performing the terms and conditions of said franchise; and

Whereas, The Ohio Public Service Company claim to be the successors of Aurel P. Gans and Melville D. Wilson to all the rights, privileges and franchises granted to said Gans and Wilson by virtue of said ordinance of the village of Orrville, passed on the first day of February, 1892, and recorded in Volume I, page 32, of the Ordinance Records of said Village of Orrville, Ohio; and

Whereas, said ordinance does not specify the length of duration of said franchise; and

Whereas, said ordinance has been repealed by said Council;

Now, Therefore, be it resolved by the Council of the Village of Orrville, State of Ohio:

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, cross arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues, and [fol. 66] public places of said Village of Orrville, Ohio, within thirty (30) days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

E. L. Kinney, Mayor.

Passed June 18, 1923. Attest: A. Jenny, Clerk.

Return of the Mayor

I hereby certify that I served a copy of the above resolution upon — —, agent in charge of the Ohio Public Service Company at Orrville, Ohio, at their office in said Village of Orrville, on the 19th day of June, A. D. 1923, at — o'clock — M.

E. L. Kinney, Mayor.

Orrville, Ohio, June —, 1923.

[fol. 67]

EXHIBIT C TO REPLY

Ordinance repealing an ordinance providing for electric light, heat, and motive power in the village of Orrville, Wayne County, Ohio, said ordinance passed February 1st, 1892, and recorded in volume I, page 32, of the ordinance records of said village.

Be it ordained by the Council of the Village of Orrville, State of Ohio, and it is hereby ordained:

Sec. 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume I, Page 32, of the Ordinance Records of said Village, be and is hereby repealed.

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29, 1923.

[fol. 68] IN COURT OF APPEALS OF WAYNE COUNTY

MOTION FOR NEW TRIAL—Filed September 4, 1924

Now comes The Ohio Public Service Company, the party aggrieved by the decision, finding and order of the court herein and moves the court for an order vacating said decision, order and finding of the court and for a new trial for the following causes:

1st. That said order, finding and decision is not sustained by sufficient evidence.

2nd That said order, finding and decision is contrary to law.

3rd. Error of the court in the admission of certain evidence offered by the plaintiff on the trial of said cause,

against the objection of the defendant, to which action of the court the said defendant duly excepted.

4th. That said findings, decision and order of the court were in favor of the plaintiff and the same should have been in favor of the defendant.

5th. Other errors apparent upon the face of the record.

Franklin L. Maier, C. H. Henkel, Attorneys for Defendant.

[fol. 69] IN COURT OF APPEALS OF WAYNE COUNTY

DOCKET ENTRIES—Filed September 25, 1924

Appearance Docket, Volume 2, Page 762.

The original Files and Pleadings, together with an authenticated Transcript, containing all the Judgments, Docket and Journal Entries of the Court of Appeals of Wayne County, Ohio, wherein the records remain with all things concerning the same are herewith returned to the Supreme Court of the State of Ohio, in the following named cause, to-wit:

Files.

Petition and Prec., July 21, 1923.

Summons, July 21, 1923.

Returnable, July 30, 1923.

Returned and filed, July 25, 1923.

Rule Day for Answer, Aug. 18, 1923.

Answer, Aug. 18, 1923.

Motion and Brief, Sept. 11, 1923.

Reply, Jan. 28, 1924.

Motion, March 20, 1924.

Three Copies Brief, June 5, 1924.

Trans. of Testimony, June 23, 1924.

Motion for a New Trial, Sept. 4, 1924.

April 1, 1924, to-wit: Decree for Plaintiff. See entry. Sheriff's Return on Summons:

Received this writ July 1, 1923, at 2:30 o'clock P. M.

[fol. 70] And on July 25th, 1923, I served the within named The Ohio Public Service Company, a Corporation,

by personally handing to M. L. Daviston for The Ohio Public Service Company, a Corporation, a true and certified copy thereof with all the endorsements thereon. The President, Mayor or Chairman or President of the Board of Directors or Trustees of Defendant or other chief officer of defendant nor its cashier, secretary, treasurer, clerk or managing agent being found in my county, the said M. L. Daviston being the person being in charge of the office and the usual place of business of said defendant in the Village of Orrville, Ohio.

A. W. Bucher, Sheriff.

IN COURT OF APPEALS OF WAYNE COUNTY

JOURNAL ENTRIES

Journal Entries Filed Jan. 28th, 1924

And afterwards, to-wit, on the 28th day of January, 1924, at and during the September term of said court, 1923, an entry was made in this cause upon the Journal of said court, which is in the words and figures following, to-wit:

On application to the court leave is granted the Relator to file his reply herein instanter, and the same is filed.

O. K.

Ross W. Funk, P. J.

Journal Entry Filed April 28th, 1924, Journal 3, Page 122

This day this cause came on to be heard to the court upon the motion of the defendant to strike out eleven different portions of parts of the Reply of the Relator to the Answer of the Respondent; on consideration whereof the court overrules said motion in toto, to which overruling of said motion the Respondent excepts.

Critchfield & Elting, Attorneys for Plaintiff.

Approved April 28th, 1924. Franklin L. Maier, Attorney for Defendant.

Journal Entry Filed Sept. 4th, 1924, Journal 3, Page 130,
April Term, 1924

This cause coming on to be heard upon the petition, the answer and the reply, the testimony and exhibits and arguments of counsel, upon consideration whereof, the court find that the defendant, The Ohio Public Service Company, has, as alleged, exercised franchise, and privilege of carrying on business in furnishing commercial and private lighting in the Village of Orrville, Wayne County, Ohio, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority from said Village of Orrville,

Therefore, it is ordered and decreed that said company be and it is hereby ousted of said franchise and privilege of carrying on said business within the village limits of the Village of Orrville, as aforesaid; and that the plaintiff recover from said defendant its costs herein expended. To all of which orders, judgments and decrees the said defendant excepts.

Thereupon the defendant gave notice of a motion for [fol. 72] new trial and said motion was filed and submitted to the court and the court being fully advised in the premises, did overrule said motion, to which order, judgment and finding of the court the defendant excepts.

The court thereupon fixed the amount of the Appeal Bond at \$500.00.

Dated this 4th day of September, 1924.

A. H. Etling, L. R. Critchfield, Attorneys for Plaintiff. Franklin L. Maier and C. H. Henkle, Attorneys for Defendant. Ross W. Funk, Presiding Judge.

(Duly certified.)

[fol. 73] IN COURT OF APPEALS OF WAYNE COUNTY

[Title omitted]

OPINION—Argued May 26, 1924; Decided July 10, 1924;
Filed September 25, 1924

WASHBURN, J.:

In this quo warranto suit, the right of the Respondent, The Ohio Public Service Co., to use the streets of the Village of Orrville by the maintenance of electric equipment therein for the purpose of supplying electricity to the inhabitants of said Village for commercial and private lighting purposes, is challenged.

Said Respondent claims this right by virtue of a franchise granted by said Village to its predecessors in title. [fol. 74] The controlling facts necessary to a determination of the case are for the most part matters of record and not in dispute.

On Feb. 1, 1892, when the business of lighting by electricity was not developed as it is today, and when such business in such places was done by isolated and local organizations, said Village, at the request of two individuals, passed an ordinance by which it was declared and ordained by Sec. 1:

“That Aurel P. Gans and Mellville D. Wilson, of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power.”

By Sec. 3 it was provided that:

“In consideration of the privileges hereby granted the said Gans & Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the Council may direct in said Village of Orrville.”

Sec. 4 provided that:

"In consideration of the construction of said electric light plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans & Wilson, their associates, successors [fol. 75] and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter annually for said lighting, a price equal to seventy-two (\$72) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted and extinguished and kept in repair by and at the expense of said Gans & Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light."

Said ordinance also contained a provision that "The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans & Wilson to perform any of the conditions hereby imposed, etc.", and that said Gans & Wilson agreed to notify the Council in writing of their acceptance of said ordinance within ten days from the passage thereof, "which acceptance, together with the ordinance, shall constitute a contract."

The ordinance contained no express provision as to the right to use the streets of the Village to furnish electricity for commercial and private lighting purposes, but the parties construed said ordinance as granting such right, and a plant was constructed under such ordinance and electricity for both public and private lighting was furnished.

While at this late day no written notice of acceptance, as provided in the ordinance, could be produced, the conduct of the parties establishes an acceptance which made the contract binding upon both parties.

[fol. 76] In 1893 a corporation known as the Orrville Light, Heat & Power Co. was formed, which corporation succeeded to the rights and assumed the obligations of Gans and Wilson under said contract and furnished electricity for both public and private lighting.

In 1902, at the expiration of said 10-year period, when said The Orrville Light, Heat & Power Co. was using the streets of said Village by virtue of said ordinance of 1892, and when the Village had the power to grant a franchise conferring the right to make such use of its streets and to fix the price to be charged the citizens of the Village for commercial lighting by the party so using its streets, said Village, without referring in any way to said ordinance of 1892 or the rights and obligations thereunder, passed an ordinance by which said company contracted to light the streets of said Village for a period of five years, and the Village agreed to pay a stipulated price for said lighting, and said Village exercised its right to and did fix in said ordinance of 1902 the price at which said company should "furnish light for full commercial lighting purposes in said Village to the citizens thereof." Said contract was executed by the parties, and at its expiration in 1907 the Village passed an ordinance by which it contracted with said company for the lighting of the streets of the Village for another period of five years, and fixed the price at which said company should furnish light for commercial purposes to the citizens of said Village.

Soon thereafter said company sold all of its assets to D. I. Rennecker and divided the proceeds accruing there-[fol. 77] from among its stockholders, and thereafter ceased to function as a corporation.

In 1910 and before the expiration of said last named 5-year period, said Village, without referring therein to the ordinance of 1892 or any of said subsequent ordinances, passed an ordinance by which it contracted with said D. I. Rennecker for the lighting of its streets for another period of five years, to begin at the expiration of the last-named contract period, and in said ordinance said Village also fixed the price at which Rennecker should furnish light or commercial lighting to the citizens of said Village.

Said Rennecker continued to operate said business for his sole account, but under the name of said defunct corporation, until 1913, when, with the approval of the Public Utilities Commission of Ohio, he sold out to The Massillon Electric & Gas Co.

Thereafter said Village determined to construct a municipal lighting plant, and there ensued much litigation

designed to prevent the construction of said municipal plant, but the same was finally constructed and put in full operation at about the time of the expiration of the 5-year period provided for in said last-named ordinance of 1910, to-wit: July 15, 1917.

After the construction and operation of said municipal plant, while The Massillon Electric & Gas Co. did not furnish electricity for the public lighting of said Village, it continued to furnish a few of the citizens of said Village with electricity for commercial lighting purposes, and in 1921 [fol. 78] the Respondent, The Ohio Public Service Co., being charged with knowledge of the situation and the public acts of said Village, purchased, with the approval of the Public Utilities Commission of Ohio, the assets and rights of The Massillon Electric & Gas Co., and since then has continued to furnish and is now furnishing electricity to some of the citizens of said Village for commercial lighting purposes, and claims the right to do so by virtue of the ordinance of 1892 and the acts of said Village subsequent thereto.

Some claim seems to be made that the Respondent has in some manner obtained from the State of Ohio the right to use the streets of the Village of Orrville without its consent and independent of any action taken by it.

Gans and Wilson received no right from the state that they could transfer to another; their right, whatever it was, which they could transfer to another, came from the Village alone, and existed by virtue of their contract with the Village.

However, this is not very important, for the Orrville Light, Heat & Power Co. was organized in 1893.

If, when the Orrville Light, Heat & Power Co. was organized, it obtained from the state by virtue of Sec. 3454 (G. C. 9170) and 3471-a (G. C. 9192 and 9193) of the Revised Statutes as they existed when said company was organized, the right to use the streets of Orrville for the purpose of furnishing electricity for commercial purposes independent of any action by the Village, such right obtained from the state as distinguished from any right obtained from the Village, was not after 1896 assignable without the consent of the state.

[fol. 79] Before said company attempted any such assignment, said Sec. 3174-a was amended so as to prohibit elec-

tric companies from exercising in a municipality without the consent of the latter, the rights granted it under said Sec. 3454; that prohibition must be construed as a limitation upon the right of assignment of such a right theretofore granted, and as requiring the consent of the state to any transfer of such a right theretofore obtained from the state.

The language of the amendment of R. S. 3471-a (92 O. L. 205) is significant. Theretofore the grant to telegraph companies to use the highways of the state provided as to streets in a city or village that the mode of such use should be agreed upon by the municipality and the telegraph company, and that if they could not agree, the probate court should settle the matter. These statutes did not apply to companies furnishing electricity; as to such companies, the law (83 O. L. 143) authorized the use of streets in municipalities, "with the consent of the municipal authorities."

Later, in 1887 (84 O. L. 7—R. S. 3471-a), the laws as to telegraph companies were made to apply to companies furnishing electricity, "so far as the same may be applicable," but the law requiring consent of a municipality to the use of the streets by electric companies (83 O. L. 143), was not expressly repealed (and to the writer of this opinion, notwithstanding the decision in 93 O. S. 428, it seems perfectly plain that it was not repealed by implication, the clause "so far as the same may be applicable" indicating an intention not to repeal the law requiring consent of a municipality to the use of its streets by electric companies).

In 1896, R. S. 3471-a was amended so as to specifically require what had theretofore been required by 83 O. L. 143 (at that time still in force and known as Sec. 8752, *Giaugue's Statutes of 1896*, and later as Sec. 3471-3 of *Bates' Statutes of 1902*, and now in force and unchanged and known as G. C. Sec. 9195), to-wit: consent of a municipality to the use of its streets by companies furnishing electricity, and the language of that amendment is significant, as has been said.

That amendment contains a provision that "provided, however, that in order to subject the same (companies furnishing electricity) to municipal control alone, no person or company shall place, string, construct or maintain any line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through

any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality.
 * * * This inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court." G. C. Sec. 9193.)

This inhibition was against "maintaining any line, etc." that is continuing to use the streets of a municipality without its consent, except only where the probate court had acted under the law, thus plainly indicating that the legislature regarded the act of 1886 (83 O. L. 143) as having been in force and as prohibiting such use without such consent, and just as plainly negatives the idea that the legislature [fol. 81] had ever granted to electric companies the right to use the streets of a municipality without the consent of such municipality.

But however this may be, this act would appear to be the exercise on the part of the legislature of its right under Sec. 2 of Article I of the Bill of Rights of the Constitution of Ohio to revoke or repeal any right which it might be said to have granted electric companies to use the streets of a municipality without its consent, and to prohibit the exercise of such right save only in cases where the probate court had by decree supplied such consent.

It would seem, then, that any right which The Orrville Light, Heat & Power Co. acquired from the state, as distinguished from a right granted by the Village of Orrville, was not transferred by said company to D. I. Rennecker and by him through the successive companies transferred to Respondent, and that in view of the law and the said acts of the legislature, no such right could have been transferred without the consent of the state.

We are not now speaking of a franchise right created by contract, but of a right or privilege granted by the state for the benefit of the public; a right granted not to any specific corporation but to all similar corporations, the grant being general and conferred by a general law.

A quasi public corporation, in respect to the right granted to it by the state to use public property, for the benefit, in part at least, of the public, owes a duty to the public to perform such public trust, and such right, in the absence of [fol. 82] express statutory authority, is non-transferable.

In the instant case there is not only no statutory authority authorizing such transfer, but there is a statutory enactment by which the state established a public policy to no longer confer such a right upon corporations thereafter organized, and the state in this action is questioning the validity of such claimed transfer.

"It is now settled by an overwhelming weight of authority that public or quasi public corporations, which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric companies, telegraph and telephone companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. This is a duty the performance of which may be enforced by the courts. And unless authority has been granted by the legislature an attempted transfer of its franchise by such a corporation is wrongful. Such franchises are, in the absence of express statutory authority, deemed to be non-transferable, for the reason that they constitute public trusts, carrying with them the duty of the performance of such trusts, and hence that liability for the performance of duty cannot be cast exclusively upon another, unless with the consent of the sovereign. It is not to be [fol. 83] understood, however, that an attempted transfer is ipso facto void; on the contrary, the transfer will be treated, ordinarily, as valid and effectual until attacked by the sovereign grantor in a direct proceeding instituted for the purpose."

12 R. C. L., Sec. 43, pages 217 and 218.

As has been said, this is a proceeding instituted by the state for the purpose of attacking said claimed transfer.

It is to be observed that Secs. 3454 (G. C. 9170) and 3461 (G. C. 9178 and 9179) of the Revised Statutes (even if made applicable to electric companies by Revised Statute 3471-a), as those statutes were in 1893, when the Orrville Light, Heat & Power Co., was organized, does not confer

an absolute right to use the streets of a village, but that the right granted by the state as to village streets, giving them the right to acquire the right to use same, is similar in character to the right of eminent domain—at least that “it partakes of the character of an exercise of the right of eminent domain.”

Zanesville vs. Telephone Co., 64 O. S. 67.

Telephone Co. vs. Cincinnati, 73 O. S., at p. 77.

A corporation's right to eminent domain is a right existing by virtue of and depending upon its being a corporation, and such right is not transferable by such corporation to an individual. See Note, 35 A. S. R. 403.

When the subsequent corporations were organized, they derived from the state no such right to use the streets of the Village of Orrville, independent of any action taken by said Village, because the law then gave such corporations [fol. 84] no right to make use of a Village street but left it optional with the Village to confer or withhold such right, and hence it seems clear to us that the right of the Respondent to use the streets of Orrville must come from and be traceable to some act of said Village.

In other words, whatever right the state granted independent of any action on the part of the Village of Orrville, was revoked by the state in the exercise of its power to do so, given it by the Bill of Rights of the Constitution, leaving the right to use the streets of Orrville to depend upon the acts of the Village.

Under the evidence in this case we do not find, as Relator asks us to find, that the Respondent did not acquire such rights as were granted by the ordinance of 1892, nor do we find that such rights have been forfeited by the conduct of Respondent and its predecessors in title.

And likewise, notwithstanding the established rule that such a grant is to be construed “strictly against the grantee and liberally in favor of the public” (52 O. S. 262), we do not find that no right to use the streets of said Village for the purpose of furnishing electricity for commercial purposes was granted by the ordinance of 1892.

In view of the fact that the parties construed said ordinance as granting such right, and that said Village for

so many years recognized the existence and transfer of such right and regulated the exercise thereof, we assume without [fol. 85] deciding, that such right was granted by said ordinance.

In 1923 said Village repealed said ordinance of 1892, and formally notified Respondent "that all rights, privileges and franchises granted to said Gaus and Wilson, their associates, successors and assigns, including said The Ohio Public Service Co., be and the same are hereby terminated and ended," and ordered Respondent to remove its poles, wires, etc., from the streets of said Village within thirty days.

The Relator claims that even if the Village had power to and did, by the ordinance of 1892, or by subsequent ordinances, grant a right to use its streets for the purpose of furnishing electricity for commercial purposes, and even if the Respondent succeeded to and acquired such right from those whom it was granted, still, the period of time during which such right should continue not being fixed, the Village had power to terminate such right by the action taken in 1923.

With this contention of the Relator we concur.

On this question a comparatively recent case decided by the Supreme Court of the U. S. is relied upon by the Respondent; that case, *N. O. T. & L. Co. vs. Ohio*, reversed the decision of the Supreme Court of Ohio, reported in 93 O S. 466.

The law as stated by the Supreme Court of the U. S. is that a franchise granted by the proper state authority without limit as to duration, "In the absence of circumstances showing an intention to give or receive a mere [fol. 86] revocable right, is a contract not subject to annulment at the will of the granting authority."

In the case at bar, two individuals, for themselves and their assigns, contracted with the village to construct a plant and light by electricity the streets of the village for a period of ten years, the village agreeing to pay them a stipulated price per light; the sections of the ordinance from 3 to 8, both inclusive, clearly have reference to that one subject and nothing else; in order to comply with the agreement to light such streets for ten years, it was, of

course, necessary for the men who proposed to do that to use the streets for the purpose of the distribution of electricity, and Section 1 of the ordinance "authorized and empowered" them to make such use of the streets, and Section 2 provided that in doing so they should not unnecessarily obstruct the streets or unnecessarily mutilate, trim or cut the trees, but that they should not be liable in damages for necessary trimming and cutting, and that the wires should be placed on poles 30 feet long and placed in the ground a sufficient depth to insure perfect safety.

Nowhere in the ordinance is there anything mentioned about commercial lighting or the price to be charged therefor. Even if that right is implied, do not the circumstances show that such right was incident to the public lighting, which was the real subject of the contract, or at least that the parties intended that at the expiration of the 10-year period such right should be at the will of the parties and revocable?

But irrespective of this suggestion, the Supreme Court of [fol. 87] Ohio, in a very recent case, expressly refused to follow the United States case and reiterated its former holding of the law to be:

"When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself. * * *

"Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; * * *

"When a pronouncement of a principle of law governing the construction of a provision of a contract entered into in this state between parties residing in this state to be

performed in this state is announced by this court, such pronouncement settles the law as to such provision, not only from the date of such pronouncement, but from the date when the rights of the parties to such contract attached, until such pronouncement is overruled by this court, or reversed by the Supreme Court of the United States.

"The fact that the Supreme Court of the United States [fol. 88] reaches a different conclusion in construing a similar provision in a particular case under dissimilar circumstances is not effective to overrule such pronouncement."

East Ohio Gas Co. vs. Cleveland, 106 O. S. 489.

This case clearly establishes the law to be that when a municipality has the right to give or withhold its consent to the use of its streets by a public utility, the giving of such consent by the municipality confers the right to use the streets and constitutes the contract by which the rights of the parties are to be determined; in other words, the franchise is given by the municipality and not by the state direct, and is to be construed as a contract between the utility and the municipality.

The Supreme Court of Ohio having determined the construction which should be placed upon a contract such as is involved in the case at bar, to be that where the contract is silent as to duration it is terminable at the will of either party thereto, and having adhered to such rule notwithstanding such decision of the Supreme Court of the United States, we follow the Supreme Court of Ohio and hold in this case that whatever right was granted by said Village to use the streets of said Village for the purpose of furnishing electricity for commercial purposes, was properly revoked and terminated by said Village, by the action taken by the Village in 1923, and that therefore the Respondent has no right to use the streets of said Village for said purpose.

A judgment of ouster may be entered.

Funk, P. J., and Pardee, J., concur in judgment.

[fol. 89] IN COURT OF APPEALS OF WAYNE COUNTY

AGREED TRANSCRIPT OF EVIDENCE

It is agreed by and between the parties that the Respondent, The Ohio Public Service Company, is a corporation organized October 11, 1921, for the purpose of building, owning, acquiring, leasing, operating, and maintaining power plants, equipment, appliances and appurtenances thereto, together with the erection, construction, maintenance and operation of the necessary pole lines, posts, piers, abutments, wires, cables, conduits, and incident thereto to drill for gas, produce gas incident to its business, to lay pipes, conduits, manholes, and other appliances and fixtures necessary and proper for the generating, manufacture, producing, procuring, selling, furnishing, supplying, conducting, carrying, transporting and distributing to public and private buildings, avenues, lanes and squares, public places, steam and hot water, electric power, light and energy and natural and artificial gas for light, heat, power and other purposes in the several municipalities, counties and political and governmental subdivisions thereof in the State of Ohio, and incident to such purpose to acquire and use street railway or railways and also to acquire all franchises necessary to the full exercise of said power.

That it filed an application with the Public Utilities Commission of Ohio, which was known as proceeding 2397 before said Commission, for authority to purchase certain property and that the Public Utilities Commission on October 12, 1921, made an order and a subsequent order on June 5, 1922; that a certified copy of such petition, order and supplemental order is herewith submitted marked Exhibit A.

That subsequent thereto and on or about the 29th day of October, 1921, The Ohio Public Service Company had delivered to it a deed by The Massillon Electric & Gas Co., which deed was recorded in Volume 190, page 334, a copy of which deed is submitted in evidence and marked Exhibit B, and that the Respondent, The Ohio Public Service Company, after it acquired such property, made, executed and delivered a mortgage thereon to The Bankers Trust Com-

pany of New York, which was dated as of October 1, 1921, and which was recorded in the mortgage records of Wayne County, Ohio, Volume 166, page 56, and following, and subsequently, made, executed and delivered a supplemental mortgage which is recorded in the mortgage records of Wayne County, Ohio, Volume 166, page 153, copies of which are hereto attached, marked Exhibits C and D, and that on October 29, 1921, The Massillon Electric & Gas Company formally assigned all its right, title and interest in and to the franchise granted Ansel P. Gans and Melville D. Wilson, their associates and assigns, February 1, 1892, which assignment is submitted herewith and is marked Exhibit E.

That The Massillon Electric & Gas Company was a corporation organized under the laws of Ohio. That the Massillon Electric & Gas Company and the Orrville Light, Heat & Power Company filed a joint application with the [fol. 91] Public Service Commission, now the Public Utilities Commission of Ohio, being proceeding No. 362, a copy of which joint application is herewith filed and marked Exhibit F.

That when the Public Utilities Commission made an order heretofore marked Exhibit F, it had before it the application, copy of which is herewith filed, a copy of an ordinance of the Village of Orrville, Ohio, dated March 12, 1910, a copy of an ordinance of the Village of Orrville, Ohio, dated Feby. 1, 1892, which are filed herewith and marked Exhibit G.

That thereafter, and on the 11th day of March, 1913, D. I. Rennecker, on behalf of The Orrville Light, Heat & Power Co., made a deed of transfer to The Massillon Electric & Gas Co., which was recorded in the Deed Records of Wayne County, Ohio, Volume 168, page 15, and following, a copy of which is herewith submitted and marked Exhibit H.

That prior thereto the Orrville Light, Heat & Power Co. made, executed and delivered a deed to D. I. Rennecker dated July 1, 1907, which was recorded in the Deed Records of Wayne County, Ohio, Volume 156, page 213 and following, a copy of which deed is herewith submitted and marked Exhibit I.

The Orrville Light, Heat & Power Company was a corporation organized under the laws of Ohio, on January 3, 1893, a certified copy of the articles of incorporation are herewith filed and marked Exhibit J.

That a copy of an ordinance entitled "An ordinance repealing the ordinance of Feb. 1, 1892," which is recorded in [fol. 92] Vol. 1, page 32, of the Ordinance Records of said Village, is submitted in evidence. Said ordinance repealing said ordinance of 1892 was passed June 18, 1923, and that a copy of said ordinance was served on the Respondent herein on the 19th day of June, 1923.

That a copy of a resolution, being notice to The Ohio Public Service Co. of the termination of the franchise granted Feb. 1, 1892, and notice to remove all poles, lines, equipment, etc., was served on the said Respondent on June 19, 1923, said resolution having been passed on June 18, 1923. That both said ordinances and said resolution were published in The Orrville Courier-Crescent, according to law. Printed copies of such ordinance and resolution are upon a pasteboard, which has been marked Exhibit K. The said ordinance and resolution were duly submitted and regularly passed by the Council.

It is admitted that all ordinances and resolutions passed or adopted by the Council of the Village of Orrville were regularly introduced, considered and adopted, and where necessary were published, and that no objection is made that they were not adopted according to the forms of the law in a regular legal and valid manner, but respondent reserves the question as to the legal force and effect thereof, and also the question of the competency of some of the enactment.

That upon receipt of notice of said resolution and repeal of said ordinance, that the Respondent thereupon addressed a communication to the Village of Orrville, Ohio, and the Council of said Village, which is submitted herewith as evidence and marked Exhibit L. Which communication was [fol. 93] received on or about July 19, 1923, and was dated July 16, 1923.

That the Massillon Electric & Gas Co. brought an action against the Village of Orrville and others in the Common Pleas Court of Wayne County, Ohio, being cause No. 24440, as shown on the appearance docket No. 53 of said court, petition having been filed March 12, 1914, and final record of said cause appearing in Volume 125, page 187, of the records of the Common Pleas Court of Wayne County, Ohio.

That said cause was appealed to the Circuit Court of Wayne County, Ohio, and known as Cause No. 637 and appears in Record Volume 6, page 287, of said court. A certified copy of which exhibit is marked Exhibit 2 and attached herewith.

That the Massillon Electric & Gas Co. also commenced an action against the Village of Orrville and others, in the Common Pleas Court of Wayne County, Ohio, which cause was No. 24458. The petition was filed April 3, 1914, as appears in the Appearance Docket 53 in the Clerk's office of the Common Pleas Court of said county. That the final record of said cause is shown in Volume 125, page 20, and following, of the final records in said office.

Said cause was appealed to the Circuit Court of Wayne County, Ohio, and was there known as cause No. 638; final record of said cause in said court is shown in Volume 6, page 291. A certified copy of which is marked Exhibit R and submitted.

[fol. 94] That there was a certain action brought in the Common Pleas Court of Wayne County, Ohio, by the Dravo-Doyle Company versus the Village of Orrville, which cause was ultimately carried to the Supreme Court of Ohio, and the record of which cause is filed herewith and marked Exhibit M.

It is further agreed by and between the parties that in case any further record should be discovered that is not now known of and admitted, that either party shall have the right to introduce such record.

That Ansel P. Gans and Melville D. Wilson, after Feby. 1, 1892, operated under and exercised the rights granted in the ordinance passed by the Council of the Village of Orrville on said date.

That the Supreme Court of Ohio in the case of Dravo-Doyle Co. vs. The Village of Orrville, reported in the 93 O. S. 236 on page 239, stated that on July 21, 1913, and prior thereto, The Massillon Electric & Gas Co., an Ohio corporation, owned an electric lighting plant in the Village and was furnishing electricity to said Village and the inhabitants thereof, for both public and private lighting, under a franchise granted by said Village in 1892, and the said franchise has not yet expired.

And on page 244 said, "The franchise was granted in 1892 and fixed the contractual rights and duties of the parties."

Relator claims that the question of duration of said franchise and the interest that The Massillon Electric & Gas Co. had under said franchise of 1892 was not in issue in the case of Dravo-Doyle Co. vs. The Village of Orrville, [fol. 95] and the statements of the court were mere obiter dicta and should not bind this court when said questions are in issue, or at least the question of the duration of said franchise, its construction and interpretation, and the said Village of Orrville is not a party in the proceedings at bar.

The Relator does not admit that the ordinance of Feby. 1, 1892, was duly and legally passed or published according to law.

The paper marked Exhibit X is admitted by the Respondent to be a list of the private consumers in Orrville and the vicinity of Orrville outside of the municipality. That there are 58 all together inside and outside the municipality. That 32 of them are outside the municipality, leaving 26 inside the municipality, one of which is The Ohio Public Service Co. itself. That the numbers beginning with 5245 inclusive and 5276 are outside of the Village of Orrville; also 8303 are outside, the others being inside the Village of Orrville on this exhibit, and that some of said 26 in the Village have double service by arrangement of switches.

(In the examination of Alfred Jenny, Clerk of the Village of Orrville:)

The Respondent admits, subject to the question of competency and materiality, that a record of outages was kept with the clerk; that the clerk has with him that record, and that the record shows the fact to be that there was a record of outages kept as shown on what is now marked exhibit Z. [fol. 96] The witness has a memorandum prepared by himself showing each year's outages beginning with 1913 and ending 1917 in June, when the contract with Renneckar, which he says he assigned to The Massillon Company, expired, is offered in evidence.

It is admitted by counsel representing the respective parties that the Village of Orrville constructed a plant for municipal and private lighting between the years 1914 and

1916, and some time thereafter, date uncertain, current was turned on for trial purposes only, and service for public lighting and private consumers was thereafter, viz.: on or about July 15, 1917, furnished by the Village; and the Village made payment to The Massillon Electric & Gas Co. to some date in July, 1917. It is also admitted that a proceeding in quo warranto was commenced in the Court of Appeals of Wayne County, Ohio, on relation of Joseph O. Fritz, Prosecuting Attorney, vs. The Ohio Public Service Company, on April 2, 1923, which was Cause 757, which was dismissed on motion of Relator, without prejudice, prior to the commencement of this cause 762.

It is also admitted that A. H. Postlewait and others made, executed and delivered a deed to The Orrville Light, Heat & Power Company for certain property in the Village of Orrville, Ohio, on July 12, 1902, which deed is recorded in the Deed Records of Wayne County, Ohio, Volume 145, page 451, a certified copy of which deed is herewith submitted, marked Exhibit N.

[fol. 97] Also that Postlewait and others made, executed and delivered a deed to D. I. Rennekar, dated September 29, 1911, and recorded in the Deed Records of Wayne County, Ohio, Vol. 164, page 450, a certified copy of which deed is submitted herewith in evidence marked Exhibit O.

That D. I. Rennekar made, executed and delivered a mortgage to J. A. Wagner and H. W. Enck, on certain property on July 1, 1907, which mortgage is recorded in the Mortgage Records of Wayne County, Ohio, Volume 141, page 117, a certified copy of said mortgage is submitted in evidence and marked Exhibit P.

It is agreed that at the time of the filing of the petition herein The Ohio Public Service Company had certain property in the Village of Orrville, Ohio.

By Relator: We admit that there were certain wires, poles, electrical equipment in the Village of Orrville, claimed by Respondent to belong to Respondent in the Village of Orrville, but Relator does not admit any title by a chain of descent of franchised rights and privileges from Gans and Wilson.

By Henkel: There was also an agreement that what was referred to as transcript of electric lighting ordinances of the Village of Orrville, Ohio, which counsel originally

agreed was a true and accurate transcript thereof, and concerning which Judge Critchfield later withdrew his agreement as to the ordinance of Feb. 1, 1892, counsel for Respondent now having offered the original records, withdraws the agreement as to this exhibit for reasons heretofore stated, chiefly that it was not a complete transcript, and also because the transcript had certain notes therein which was not a matter of record but the individual opinion of the one preparing the transcript.

It is understood that counsel will cause to be prepared copies of the records to be certified to by the clerk and that the same will be submitted in evidence in place of the original records. It being understood further that in reference to the records of the proceedings of the council only such portion of the minutes will be prepared as refer directly to the subject matter in issue.

Critchfield, addressing Henkel: I do not know just where we are at in regard to the introduction of the resolution passed on June 18, 1923, being a notice to the Respondent of the termination of any ordinance under which they claim to light the streets of Orrville?

Answer by Henkel: I believe that the agreed statement of facts shows that this resolution was submitted, considered and properly passed; that the same was approved and notice thereof was served upon the Respondent on June 19, 1923.

Question by Critchfield: As to the repeal of the ordinance of Feb. 1, 1892, what do you agree as to that?

[fol. 99] Answer by Henkel: If the agreement of facts does not already show such agreement, it is now agreed that an ordinance entitled "An ordinance repealing an ordinance", etc., passed Feb. 1, 1892, and recorded in Volume 1, page 32 and so forth, was properly submitted, considered and adopted by the Council of the Village of Orrville, Ohio, and published, and that a copy thereof was served upon the officers of the Respondent, and that a copy of said resolution and said ordinance were served upon the Respondent and are in evidence marked Exhibit K.

Critchfield: There has been introduced in evidence by the Respondent cases in which The Massillon Electric & Gas Co. and the Dravo-Doyle Co. and the Village of Orrville were parties; we object to the competency and relevancy of

said cases, because the State of Ohio was not a party to those cases in any manner and therefore not bound by any judgment, decision or decree in those cases.

IN COURT OF APPEALS OF WAYNE COUNTY

Statement of Evidence

Be it remembered that at the trial of this cause, which came on to be heard on the 26th day of May, 1924, being a date in the April Term, 1924, of the Court of Appeals of Wayne County, Ohio, before the Hon. Ross W. Funk, Hon. [fol. 100] G. C. Washburn, and Hon. Wm. S. Pardee, Hon. Ross W. Funk presiding, the Respondent, to maintain the issues on its part to be maintained, offered the following testimony:

Thereupon the respondent called the witness CHARLES B. GILBERT, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. State your name?

A. Charles B. Gilbert.

Q. Where do you live?

A. Cleveland, Ohio.

Q. How long have you lived there?

A. Since 1902.

Q. You may state whether or not at one time you were interested in the lighting business in the Village of Orrville, this county?

A. Yes, sir.

Q. When?

A. From late in 1892 until 1902.

Q. Can you state to the court when the lighting plant was constructed in Orrville?

A. To the best of my recollection the direct current to furnish street lighting was given a tryout about the 20th of May, 1892, and they burned an armature.

Q. By whom was that plant constructed?

A. David King and J. A. Wagner.

Q. Did you now Gans and Wilson?

A. Yes, sir.

Q. You may state whether or not King and Wagner were associated with Gans and Wilson?

A. They were.

Q. How long were you connected with that plant?

[fol. 101] A. I went to Orrville as an employe in October or November, 1892.

Q. You continued in that capacity how long?

A. Two years.

Q. Do you remember of the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. State whether or not you became a stockholder or interested in that company?

A. I think in 1894 or 1895 I purchased David King's half interest in the Orrville Light, Heat & Power Company, which consisted of fifty shares of par value stock.

Q. Who else was interested in that project?

A. They were under the control of J. A. Wagner, Canal Dover.

Q. State whether or not Gans and Wilson were not also residents of Canal Dover, Ohio?

A. They were for a time.

Q. How long did you continue in control or operation of that project?

A. From the time of the project until 1892; until the Village of Orrville granted a new lighting contract.

— From 1892 to 1902 state whether or not that plant was continually operated?

A. Yes, sir.

Q. By whom?

A. I was in absolute charge myself.

Q. If you know, you may state whether or not it was operated under a franchise of February 1, 1892?

Objected to; sustained; exceptions.

Q. If you know, you may state under what arrangement, if any, the plant was operated from 1892 until 1902, when you left?

A. I knew nothing about the operation until the time I [fol. 102] purchased the 50 shares of stock from David King. At that time I found out that they did have a franchise.

Q. Was there a writing between you and King?

A. Yes, sir.

Objected to.

Q. Have you that agreement?

A. No, sir.

Q. Have you any copy?

A. No, sir, no records whatever.

Q. A search would not help you?

A. No, sir.

Q. You bought half the stock?

A. Yes, sir.

Q. Did you make an investigation?

A. Yes, sir.

Q. What did you ascertain the fact to be as to operation in the Village at that time?

A. I ascertained to my own satisfaction.

Q. What did you find out?

A. Before I finally closed the deal, I satisfied myself that we had a valid franchise under which we were operating.

Counsel for Relator asks that the answer be stricken out; overruled; exceptions.

Q. While you were there you may state whether or not The Orrville Light, Heat & Power Co. entered into any agreement at any time with the Village of Orrville for public lighting?

A. They did.

Q. You may state whether or not you ever had any negotiations with the Council of the Village of Orrville?

A. A great many.

Q. Will you briefly detail just what negotiations you had with the Village?

Objected to; overruled; exceptions.

[fol. 103] A. About, I should say, about 1896 or thereabouts there developed quite a sentiment in favor of municipal ownership in Orrville, and the plant of the Orrville

Light, Heat & Power Co. was situated at the intersection of the three railroads; in the meantime, the Village of Orrville had built the waterworks plant, which was about a mile and a quarter north of town, not on the railroad. Naturally, I made every effort to prevent the building of the new plant, without first having purchased the one we had purchased and established. Of course, in this controversy as to whether this municipal ownership should be had or not, I appeared before the Council at the special election to issue \$15,000.00 worth of bonds, and I was given the privilege of the floor at different times.

Q. At any time was the question of the franchise in existence?

Objected to.

A. The first election the Village lost and my attorneys, Weygandt and Horn, came to the Common Pleas Court and secured a temporary injunction, and in the meantime we secured an amendment to the state law which prohibited any village in the State of Ohio from making a gas plant in the State of Ohio without first purchasing those in existence. I appeared on the floor of the Council the night that they prepared to sell the bonds after the second election had been carried by the city. At that meeting I stated to Judge Orr, who was city solicitor, that it would be well to examine a new law that prevented the city from building an electric light plant.

[fol. 104] Q. I direct your attention to the previous question whether or not at any time when you appeared on the Council floor there was or not discussed this grant of February 1, 1892?

A. It was discussed.

Q. Will you relate to the court as near as you can what took place?

A. I made the statement that I contended that the franchise was indefinite and therefore perpetual.

Q. What, if anything, did any member of the Council say?

A. It never was contradicted.

Cross-examination.

By L. R. Critchfield:

Q. You are an attorney?

A. No, sir.

Q. Where did you get the idea that that ordinance of 1892 was perpetual?

A. From Tom L. Johnson, who was my particular friend.

Q. He did not know what some of the courts have been holding about some of those franchises?

A. Possibly not.

Q. It came up in 1896?

A. I think so, about that time. After that they arranged the lighting contract with various people.

Q. From 1897 to 1902; 1907 to 1912?

A. Yes, sir.

Redirect examination.

By C. H. Henkel:

Q. To whom did you sell?

A. Mr. Wagner made the negotiations; I think it was Mr. Enck.

[fol. 105] Q. When you made that sale, how was it made?

A. Transfer of stock certificate.

Re-redirect examination.

By L. R. Critchfield:

Q. There was no writing or written agreement between you and Wagner when you sold out, outside of the transfer on the books of your fifty shares?

A. I don't think so.

Q. When was that?

A. 1902.

Q. Was that before or after the contract ordinance was granted to the Orrville Light, Heat & Power Company?

A. After. We had an agreement, Mr. Wagner and I, that neither party would sell without the other's consent.

Q. This talk that you had with the Council, there was no councilmanic action taken or passing any ordinance or resolution by the Council, was there?

A. This was at the time these bond issues were pending.

Q. No action was taken by the Council in any way as to a franchise for electric lighting for the Village?

A. None, only to provide bonds to build a new municipal plant.

[fol. 106] And, further, the respondent, to maintain the issues on its part, called the witness GEORGE W. KING, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. State your name?

A. George W. King.

Q. Where do you live?

A. Dover.

Q. How long have you lived there?

A. Sixty years.

Q. Did you know Ansel P. Gans?

A. Yes, sir.

Q. Did you know Melville D. Wilson?

A. Yes, sir.

Q. Tell the court what your father's name was?

A. David King.

Q. State whether or not your father was associated with Ansel P. Gans and Melville D. Wilson in the construction of a plant at Orrville?

A. Yes, sir.

Q. When did he become so associated, if you know?

A. They got a franchise and then they came back to him. As I understand it, he furnished the money to build the plant.

Counsel for Relator asks that the answer be stricken out; sustained; exceptions.

Q. You may state from your own knowledge whether or not your father, David King, became associated with Gans and Wilson in the construction of a light plant at Orrville, Ohio?

A. Yes, sir.

[fol. 107] Q. When?

A. About the time they took the franchise.

Q. After that time, state whether or not your father continued to be interested in that property?

A. Yes, sir.

Q. If you know the fact to be, you may so state, whether your father, yourself and three Wagners organized, Jan. 3, 1893, The Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. How long, if you know, did you and your father continue to have an interest in this Orrville property?

A. He had an interest in it until Mr. Gilbert bought my father out.

Q. You said a moment ago you did not remember just what date it was?

A. No, sir.

Q. If you recall, you may state whether or not you and your father transferred this stock in your company to Mr. Gilbert, who just testified?

A. Yes, sir.

Objected to.

[fol. 108] And, further, the respondent, to maintain the issues on its part, called the witness HENRY W. ENCK, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. Henry W. Enck.

Q. Where do you reside?

A. Dover, Ohio.

Q. How long have you resided there?

A. About 75 years.

Q. Did you know Mr. David King?

A. Yes, sir.

Q. You may state whether or not at any time you became interested in The Orrville Light, Heat & Power Company, and if so, when?

A. About 1902 I bought a half interest.

Q. From whom did you acquire that interest?

A. The conversation was between Wagner and I, but when the deal was made it appeared to be Gilbert's half interest.

Q. Who at that time, when you purchased an interest in this company in 1902, who owned the other half?

A. John Wagner.

Q. If you know, were any records kept of the proceedings of The Orrville Light, Heat & Power Co.?

A. I don't know anything about it.

Q. How long did you continue to be interested in this company?

A. I think about four years.

[fol. 109] Q. During that time you may state whether or not the light plant was operated in Orrville?

A. Yes, sir.

Q. Was any other company operated there during that period of time?

A. No, sir.

Q. Do you know to whom you sold?

A. To Renneckar.

Cross-examination.

By L. R. Critchfield:

Q. The whole corporation sold to Renneckar?

A. Yes, sir.

Q. He was an individual?

A. Yes, sir.

Q. How was that done, by a proceeding according to law to sell out the whole assets of the company?

A. I suppose so, because we sold him everything we had.

Q. You got paid?

A. Yes, sir.

Q. Do you know how it was done?

A. They paid the money and they kept on running.

Q. You do not know whether the law was complied with or not, do you?

A. I know we sold all I had.

Q. Was that sale made in writing?

A. It was all verbally. It was paid in money before he left. It was at my office at Dover.

Q. Mr. Renneckar paid in money?

A. I was talking about when I bought. He did not pay it all in cash.

Q. How did he pay it?

A. He paid in installments.

Q. Did you people have any writings at that time?

A. I did not. Mr. Wagner attended to that part.

Q. Is he here?

A. He is dead long ago.

Q. You say you had no writings for the part you took in it?

A. I got certificates.

[fol. 110] Q. In the bank?

A. Stock certificates.

Q. What kind?

A. Stock certificates.

Q. In what?

A. In this company.

Q. You still owned stock in the company after you sold out to Rennecker?

A. The stock certificates were not good then.

Q. What did you get from Rennecker?

A. I think it was \$12,000.00.

Q. How did you get it, in money or check?

A. I don't know. As it came due I got my share. I don't know how he paid Wagner. I got my share.

Q. You know you got your money and that is about all you know?

A. That is about all.

And, further, the respondent, to maintain the issues on its part, called the witness T. P. WAGNER, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. T. P. Wagner.

Q. Where do you live?

A. New Philadelphia.

Q. How long have you lived there?

A. About 32 years.

Q. You may state whether or not you were ever interested in The Orrville Light, Heat & Power Company?

A. Yes, sir.

[fol. 111] Q. State whether or not you were one of the organizers of that company?

A. Yes, sir, I was.

Q. Who was John A. Wagner?

A. My father.

Q. John Wagner?

A. My brother.

Q. Did you know David King?

A. Yes, sir.

Q. And George King?

A. Yes, sir.

Q. State whether or not the five of you incorporated this Light, Heat & Power Co.?

A. Yes, sir.

Q. How long were you connected with this company?

A. From 1893 to the time we sold to Renneckar, that was about 1907.

Q. If you know the fact, you may state whether or not The Orrville Light, Heat & Power Company took over the plant and property that was originally constructed by Ansel P. Gans and Mellville D. Wilson?

A. Everything they had we took over.

Q. For a while were you secretary of this Orrville Light, Heat & Power Company?

A. Yes, sir, from 1895 on.

Q. Any minutes kept of the stockholders of that company?

A. Yes, sir.

Q. Do you know what became of them?

A. No, sir, my father had charge of those.

Q. Is he now living?

A. No, sir.

Q. How long did you continue to have an interest in the Orrville Light, Heat & Power Co.?

A. From 1893 to the time we sold out in 1907.

Q. During that period of time, state whether or not this plant was operated in the Village of Orrville?

A. Yes, sir.

[fol. 112] Q. Did anyone else during that time operate any light plant?

A. No, sir.

Q. The streets and public places of the Village were not used by any other company in the Village than the Orrville Light, Heat & Power Co.?

A. No, sir.

Cross-examination.

By L. R. Critchfield:

Q. This franchise of 1892 was given to Ansel P. Gans and Melville D. Wilson, wasn't it?

A. Yes, sir.

Q. You people, the Orrville Light, Heat & Power Co., did not get the franchise from the time that the Gans and Wilson franchise was given until 1902, did you? At the end of the ten years?

A. We simply took over what they had.

Q. Did you get a written assignment?

A. I can't say as to that, only I know all the papers they had were turned over to us.

Q. Did the directors of your company take any official action in buying out Gans & Wilson?

A. The time Gans & Wilson were bought out we were not incorporated at that time.

Q. When were you incorporated?

A. 1893, Feby. 3rd.

Q. When was Gans & Wilson bought out?

A. They were bought out in 1892.

Q. How long did Gans & Wilson run that lighting plant?

A. I can't say.

Q. Not after you were incorporated?

A. No, sir.

[fol. 113] Q. After you were incorporated, was any official action taken by the Village of Orrville before 1892?

A. I cannot say.

Q. What was done by you men was all done without the knowledge or consent of the Village of Orrville?

A. There was no objection made.

Q. You never consulted the Village of Orrville in your transactions?

A. There was no reason to because there was no question raised about it.

Q. You did all on your own hook and Orrville was not consulted?

A. I can't say as to that, some of the officials may have consulted them. My father might have done it.

Q. Who was secretary?

A. I was there from 1895.

Q. Who was secretary before that?

A. My brother, John.

Q. Where is he?

A. Cleveland.

Q. Did he keep the books?

A. I don't think so.

Q. Did you keep much books.

A. They kept them at Orrville and the report would be sent to father, who would take care of them.

Q. You don't know what record was kept on your books outside of bills payable and receivable?

A. They were kept at Orrville.

Q. Did you attend the directors' meeting of the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. Where was it held?

A. At Dover, usually.

Q. Were the books brought down there at that time?

A. Yes, sir.

[fol. 114] Q. Do you remember of them being there at Dover at directors' meetings?

A. Yes, sir.

Q. You can't tell us what was in the books of any purchase from Gans and Wilson?

A. No, sir, not in the secretary's books.

Q. When you bought out anybody it was done by buying his shares of stock?

A. I was never connected with the plant until it was reorganized.

Q. There was nothing said about a franchise?

A. Anyone buying stock would want to know if they got a franchise. If they would not have had they would not buy any stock in it.

Q. You told them you had a good franchise?

A. That was what I was told; a good franchise, a perpetual.

And further, the respondent, to maintain the issues on its part, called the witness CLARA M. BARKEY, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. Clara M. Barkey.

Q. What was your maiden name?

A. Postlewait.

Q. State whether or not your father and uncle were interested in the Orrville planing mill?

A. They were the owners.

[fol. 115] Q. Was your father or uncle a member of the Council at that time?

A. Neither one.

Q. Do you recall that the lighting plant was built near the property of the planing mill?

A. Yes, sir.

Q. For a period of time, possibly from 1892 to 1902, you had charge of some of the books?

A. Yes, sir.

Q. Do you know whether or not any other lighting company was operating in the Village at that time?

A. No, sir.

Q. Do you know whether or not rental was paid the planing mill for that lighting plant at that period of time?

A. Yes, sir.

Q. Do you know of the execution of deeds from the planing mill to the Orrville Light, Heat, & Power Co.?

A. This deed at this time, this man was not my uncle; he was a partner of my father. They executed a deed to the Orrville Light, Heat & Power Co. for the sale of land.

Q. That was in 1902?

A. Yes, sir.

Q. Subsequently, about 1911, do you know whether another deed was executed and delivered?

A. Yes, sir, a small parcel of land was executed to give them a driveway near their plant.

[fol. 116] And, further, the respondent, to maintain the issues on its part, called the witness D. I. RENNECKAR, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. D. I. Renneckar.

Q. Where do you now reside?

A. Canton.

Q. How long have you resided there?

A. Between eight and nine years?

Q. Were you at any time interested in the lighting property at Orrville, Ohio?

A. Yes, sir.

Q. When? How did you become interested?

A. From 1907, July 1st, until March 1913, March 13th.

Q. When you went there in 1907 what kind of a property was there; was their lighting plant operated for public and private lighting?

A. Yes, sir.

Q. How many plants were there in Orrville then?

A. One.

Q. Who operated that plant prior to your taking an interest in it in 1907?

A. The Orrville Light, Heat & Power Co.

Q. When you bought it what interest did you acquire in it?

A. The entire plant.

Q. How did you acquire that interest, from whom?

A. From the Orrville Light, Heat & Power Co., J. A. Wagner as president.

[fol. 117] Q. You may state whether or not you then took over that property and operated the same?

A. Yes, sir.

Q. For what period of time?

A. About 6 years.

Q. During that period of time state whether or not you had any negotiations with the Council of the Village of Orrville?

A. Yes, sir.

Q. When you took over that property and while you operated the same, during that period of six years, you may state, if you know, by what right or under what grant or privilege you operated the same?

A. J. A. Wagner presented to me what he supposed to be or stated to be a franchise before I bought it. I saw that. Then I also operated under the ordinance such as our time contract, a five-year period contract.

Q. Mr. Wagner gave you a certain instrument, do you remember the date?

A. It was considered a franchise.

Q. Do you remember the date of it?

A. 1892.

Q. You also say you operated under a time contract, just what do you mean by that?

A. An ordinance for the period of time given for the privilege of operating. I considered it an ordinance stating the time period giving the price of lighting and so forth.

Q. Did you then sell this property?

A. Yes, sir.

Q. When you sold it you may state whether or not you filed an application with the Massillon Company before the Public Utility Commission at Columbus?

A. Yes, sir.

Q. You may state whether or not you attended a hearing there?

A. Yes, sir.

[fol. 118] Q. If you know, you may state whether or not an order was made authorizing the sale of it and the purchase of that property?

A. Yes, sir.

Q. Following that order you may state whether or not you executed and delivered a deed for the transfer of this property?

A. Yes, sir.

Q. You may state whether or not following the order made by the Public Utilities Commission, you did transfer any rights or privileges to The Massillon Electric & Gas Company?

A. Yes, sir.

Cross-examination.

By L. R. Critchfield:

Q. When did you say you bought out the Electric Light and Power Co.?

A. The first day of July, 1907.

Q. When was the contract ordinance given to you?

A. An unexpired went in when we bought the plant.

Q. How long had it to run yet?

A. It had run between two or three years; probably had three years to run when we bought it.

Q. You bought it shortly after the contract ordinance was passed?

A. Probably two years.

Q. You bought it from the Orrville Light, Heat & Power Co.?

A. Yes, sir.

Q. Did you see the ordinance under which they were operating?

A. Yes, sir.

Q. Did you notice in that ordinance the ordinance was confined to The Orrville Light, Heat & Power Company, and not any assigns or successors?

[fol. 119] Objected to.

A. I can't say I did.

Q. How did you buy this from the Orrville Light, Heat & Power Co.? What proceedings were had?

A. We got together on price and terms and agreed to meet at a certain date and make a deal, and we fulfilled our part of the contract and they gave us a deed.

Q. Any other papers?

A. Only what the deeds called for.

Q. The deed was the only paper?

A. Yes, sir.

Q. That was to you as an individual, to D. I. Rennekar?

A. Yes, sir.

Q. You ran the plant up until about 1910 or 1912?

A. About 1913, in March.

Q. This five-year period ran out in July, 1912, do you recall that?

A. Probably it did.

Q. Before that some time you got another contract with the Village for five years more?

A. Yes, sir.

Q. Do you recall that that contract you got beginning in 1912 was to D. I. Rennekar as an individual?

A. I don't remember what it was.

Q. You go down to the Public Utilities Commission and get leave to sell out to The Massillon Electric Light Co.?

A. Yes, sir.

Q. You turned over possession to the Massillon Company?

A. Yes, sir.

Q. When you were running this plant, where did you get your electricity?

A. We manufactured it on the ground.

Q. Near the planing mill?

A. Yes, sir.

[fol. 120] Q. So long as you ran it, did you manufacture electricity there?

A. Yes, sir, toward the latter part of the period The Massillon Gas & Electric Company there was an option given. I ran the plant a few months that they furnished the current. I got the proceeds just the same.

Q. It was not manufactured by the Massillon company on the ground in Orrville?

A. Just as soon as they were ready to furnish current they took the plant over, and there was a period between the time we sold to the Massillon Gas until they got their lines there that I ran the plant and we manufactured our own current there, but they were really the owners of it.

Q. What ordinance or franchise do you claim you were operating under when you were operating the plant?

A. The rights that were turned over to us from the Orrville Light, Heat & Power Co.

Q. What rights was that?

A. The ones we have just been speaking of.

Q. When were they granted to anybody?

A. I don't know the date.

Q. After you sold out to the Massillon Company through an act of the Public Utilities Commission, did the Massillon Co. furnish electricity in the Village of Orrville?

A. Yes, sir.

Q. Where did they procure that?

A. At Massillon.

Q. What became of the central manufacturing plant in Orrville?

A. I don't know.

Q. Did that cease to operate for the manufacturing of electricity while you were in Orrville?

A. They were operating in some shape or other.

[fol. 121] Q. Manufacturing electricity?

A. I presume so.

Q. Were they not getting any on an outside line from Massillon?

A. I don't know where they got it. To the best of my knowledge I could not say.

Q. Were you around that plant any?

A. We lived in Orrville two years after.

Q. You went to the plant afterwards?

A. I went by it.

Q. After you sold out to them all your connection of the lighting with Orrville ceased, did it?

A. Yes, sir.

Q. Did you receive cash or the equivalent when you sold out, or did you receive stock in the company?

Court: That is immaterial.

Q. While you were operating this plant did you receive any rights in any way through the Village Council of Orrville?

A. We had the contract renewed for a five-year period.

Q. Beginning in 1912?

A. I believe so.

Q. That is the only thing you received from the Village of Orrville?

A. Yes, sir.

Q. What did you receive when you bought from the Orrville Light, Heat & Power Company? What did you receive in the way of a written contract? I believe you stated nothing but that deed, is that correct?

A. Yes, sir, the deed stated what I received. I received a copy of the franchise. It was said to be a copy of the franchise, and I afterwards investigated and found it was. [fol. 122] Q. You compared it with the original?

A. Yes, sir.

Q. Who had that franchise been granted to?

A. I believe it was Gans and Wilson.

Q. Do you remember the time, Feb. 1, 1892?

A. No answer.

Redirect examination.

By C. H. Henkel:

Q. Judge Critchfield inquired of you under what franchise or ordinance you claimed the right to operate in the Village of Orrville, Ohio; I would like to inquire in addition to that whether or not you claim that while you operated there you did or not operate under the grant of February 1, 1892?

A. I did.

Q. Can you state to the court what the Orrville Light, Heat & Power Co. and yourself intended when in the instrument of conveyance between the Orrville Light, Heat & Power Co. and D. I. Rennekar it was prepared for the conveyance of a franchise, under which said grantors operated in said Village, what the parties thereby intended?

Objected to; overruled; exceptions.

A. They intended to convey the same.

Respondent rests.

[fol. 123] Thereupon the Relator, to maintain the issues on its part to be maintained, called the witness GEORGE MARTIN, who, being first duly sworn, testified as follows:

Direct examination.

By A. H. Etling:

Q. You may state your name?

A. George Martin.

Q. Where do you live?

A. Columbus, Ohio.

Q. In what employment are you?

A. I am with the Snook-Hillhouse Company, Consulting Engineers.

Q. How long were you employed by that company?

A. Approximately a year.

Q. In what work have you been engaged by the Snook-Hillhouse Co. in particular?

A. In appraisals, valuations and rate cases before the Public Utilities Commission.

Q. How long have you been practicing in that capacity before the Public Utilities Commission?

A. I was employed as appraisal engineer with them for about five years.

Q. Prior to your employment now?

A. From 1914 to 1919.

Q. During that employment what work in the appraisal of electric properties did you engage in and where?

A. I was engaged in the appraisal of the Cleveland Electric Illuminating Co. at Cleveland, Ohio, while employed as appraisal engineer with the Public Utilities Commission, [fol. 124] both in field work in collecting the data relative to an inventory, and later after that was finished in compiling and summarizing the field work and applying prices.

Q. Was there any other work that you did besides that?

A. In electric lighting property valuation I was employed by the Metropolitan Edison Company at Reading, Pennsylvania, as appraisal engineer in charge of the application of prices to the inventory which was previously prepared.

Q. Any other experience along this line that you have not mentioned?

Henkel: We admit the witness is properly qualified.

Book marked Relator's Ex. 1 offered in evidence and objected to by Respondent; objection overruled; exceptions to this line of testimony.

Q. In your employment with the Snook-Hillhouse Co. did you make an appraisal of the property of The Ohio Public Service Co. in the Village of Orrville?

A. Yes, sir.

Q. When was that?

A. Approximately the middle of March this year.

Q. Did you do that work yourself or supervise it?

A. I did part of the work, and all the work was under my supervision.

Q. You were in Orrville?

A. Yes, sir, during the period that the inventory was made and work done in the office.

Q. Following that what did you have to do with that?
[fol. 125] A. Part of that work was done by myself personally, and all of it under my direct supervision.

Q. After this appraisal was made, what did you do in the way of investigation and comparison and correction?

Henkel: We will admit that he did those things and that the statements he makes are correct.

Q. Is this appraisal a true and correct appraisal of the property of The Public Service Company in Orrville, Ohio?

A. It is to the best of my knowledge and belief.

Relator's Exhibit 1 introduced in evidence; objected to; overruled; exceptions.

Q. What is the value of property used and useful as shown in this appraisal by The Ohio Public Service Company within the Village of Orrville, Ohio?

A. That figure as shown on Sheet 1 of the appraisal and the present value amounts to \$11,986.00.

Q. In that property, included in that appraisal value of \$11,986.00, does that include the value of the sub-station situated in the southern part of Orrville?

A. It does, yes, sir.

Q. Does that sub-station supply any other users of electric current than people within the Village of Orrville?

A. Yes, sir, it does.

Q. What per cent of the capacity of the sub-station is used by others than inhabitants of the Village of Orrville?

Objected to; overruled; exceptions.

[fol. 126] A. About fifty per cent.

Q. By whom is that fifty per cent used?

A. By the creosote plant.

Q. Is that located within the corporate limits of Orrville?

A. No, sir. It is outside.

Q. If you will, explain to the court what is the valuation of the sub-station found on page 3?

A. The sub-station land, present value is \$100.00; sub-station structure \$1,156.00; sub-station equipment \$2,704.00; total value of the sub-station land, structure and equipment \$3,960.00 of which about 50 per cent is used and useful for the operation of the creosote plant outside of the city limits.

Q. So that to make a proper deduction from the value given for property used and useful in the Village of Orrville what balance would be left?

A. Deducting 50 per cent approximately \$2,000.00 deducted from the present value shown on page 3 would be approximately \$7,000.00.

Q. You made an appraisal of this property in the Village of Orrville; were you there personally?

A. Yes, sir.

Q. What is the value of the property which the Ohio Public Service has now in Orrville which would be fit for use in public lighting?

Objected to; overruled; exceptions.

A. The value of the plant inside of the corporation used and useful as shown on page 1 of the valuation is \$11,986.00, that is the total plant, including all overhead expenses.

[fol. 127] Q. What is the value of the property which the Ohio Public Service Co. has now in Orrville which would be fit for public lighting?

A. The total amount of the plant not used or useful inside of the corporation of Orrville is shown on page 17, and the present valued amount is \$7,181.00.

Q. I wish you would tell the court not the portion of the plant which is there for public lighting not being used, but how much property there is there to carry out this original contract for public lighting?

Objected to.

Q. For public lighting, street lighting?

Objected to.

A. That is shown on page 18. The first item of municipal lighting is account No. 522, which amounts to \$500.00, and the next account is No. 552—\$1,104.00. The last item, No. 561, is \$588.00, making a total of \$2,192.00. Present value would be \$1,234.00.

Q. Of that amount how much is used and useful?

A. None of it is used and useful at present.

Q. What is the condition of the plant as you saw it there as to poles and wire?

Objected to; overruled; exceptions.

A. The municipal lighting portion of the plant not being used, the arc supports and span wires are some of them down and in bad shape. Also the wire which transmits the current to these lamps is not in good shape, the insulation is bad, and there are portions of this plant where several spans are missing so that it is not in operating condition.

[fol. 128] Q. What as to poles that have no wires on them at all?

A. There are a number that have no wire on at all or no fixtures of any kind; I have made a list of that, if you wish I can tell you. Some of the streets where there are no wires or fixtures on the poles are in West Oak Street, Garfield, South Main, East Oak Street, South Walnut Street, Westwood Avenue, Mohican Street, West Church Street, North Walnut Street, South Elm Street, North Main Street, Orr Street, Park Street, Fike Avenue, West Market Street, South Vine Street, Waverly Street and Mineral Springs Street, and the total number of poles in these

streets which have no wire or fixtures amount to about twenty-five per cent of the entire pole and wire plant.

Q. Are there places where poles are missing and have been removed?

A. I don't recall whether there are any poles missing or not.

Q. What method of lighting is this street lighting system arranged for; what kind of lights?

A. I believe it is a series of arc lamps.

Q. Any arc lights there now?

A. No, sir.

Q. Any arc lights anywhere on the property of The Ohio Public Service Co.?

A. There is some in the storehouse at the power plant.

Q. What about the use of arc lights as to whether they are in use now?

A. None at present.

Q. Are they used anywhere?

A. No, sir.

Q. They are out of date?

A. Yes, sir, they are an obsolete type.

[fol. 129] Q. Are these wires and supports hanging over the streets in Orrville?

A. Yes, sir, in some places the arcs are across street intersections.

Q. In your investigation what would you say as to them being dangerous or not as you find them at places?

Objected to; overruled; exceptions.

A. If those arc wires are carrying current they are very dangerous; even if they are not, they may fall down and interfere with traffic.

Q. Did you find some of those wires carrying current?

A. I did not make a test.

Q. The street lighting system, did you find some of those wires carrying current?

A. I made no test for that.

Q. What about the danger from the wires from the standpoint of insulation, and their swaying on the private lighting system?

A. If they should come in contact with a private lighting

wire where the insulation is bare it would cause a short circuit and destroy some of the property.

Q. Are there places where this is not being carried on poles belonging to the Ohio Service Co.?

A. Yes, sir, some places where the system is conducted on telephone and municipal lighting poles.

Q. At those points their own have been removed?

A. If there ever have been any there. I don't know.

[fol. 130] Cross-examination.

By C. H. Henkel:

Q. The Village was operating a lighting plant when you were there making your investigation?

A. I believe so.

Q. Do you know how long the municipality was operating that plant?

A. I do not know.

Q. When you made this appraisal and attempted to fix the value of this property, you took things just as you found them?

A. I tried to, yes, sir.

Q. So far as fixing the valuation or fixing the appraised value of the property, it makes no difference as to what is used or useful for a particular service?

A. We have set it up both used and useful and not.

Q. For the purpose of appraisal for valuation it is not necessary?

A. It is usual to distinguish between them.

Q. Do you not only encounter the term "used and useful" for rate-making purposes?

A. The uniform classification accounts for electric utilities by the Public Utilities Commission of Ohio employs a phrase of that character.

Q. Is not that for the purpose of allocating the property to determine your domestic and commercial rates?

A. I merely stated that this division was set up in here and the classification made in that manner, used and useful and not used and useful inside the corporation.

Q. That is, your set up is made according to suggestions or directions, is that not true?

[fol. 131] A. There is no suggestion made by anyone except it was thought best to set it up that way in our office.

Q. Suppose this court was saying to you they wanted to know the value of that property, it would be necessary to set up used and useful, you could go to page 32 and you would have your present value?

A. Yes, sir.

Q. Property has a certain value whether used for a particular purpose?

A. Yes, sir.

Q. Do you know in how many instances the Village is also using some of this company's property, poles and wires for the transmission of their electricity?

A. I made no investigation of that phase of it.

Q. You know it to be a fact that that is not true?

A. No, sir, not of my own knowledge.

Q. Do you know where the poles you testified in some places some poles were missing; in those places did you find other poles were placed by the municipality?

A. I do not recall anything of that sort.

Q. The condition that you found this property in was a natural one from years of disuse; isn't that true?

A. Possibly so.

Q. Had the Ohio Public Service Company been permitted to furnish current for public lighting, you don't know what type or system it would now be using, do you?

Objected to; overruled; exceptions.

A. I believe it is now using a three-phase system.

Q. When you said in chief that this system was obsolete, you mean it is obsolete at the present time? You do not [fol. 132] have in mind at the time it was discontinued by the municipal lighting plant?

A. I believe it was used in connection with the plant.

Q. Their system is such it could provide for any style in municipal lighting?

A. I presume so.

Q. Is there any disadvantage in not having a central plant within the corporate limits of a municipality?

Objected to; overruled; exceptions.

A. It is probably an advantage for a corporation like the Ohio Service Company to have a plant outside the city.

Q. The service to that community can be distributed just as well over a high transmission line as from a central plant?

A. Certainly.

Q. Did you take into consideration at all that there would be a value to this property as a going concern?

A. No, sir, that was not included in this valuation.

Q. Is not that a proper item?

A. For rate making purposes.

Q. Did you take into consideration that it cost this company any money to establish the business it was enjoying up to 1917?

A. We were interested in the present plant.

Q. You did not attempt to look into the past at all as to the value of that property, or the number of consumers?

A. No, sir.

Q. You are looking at it now in the present condition?

A. Yes, sir.

Q. Who pointed out to you this property?

A. I do not understand your question.

Q. Who pointed out the poles and wires to you?

[fol. 133] A. I believe they had a mark on it which designated the ownership.

Q. Is that the only way you had of arriving at the property belonging to The Ohio Service Company?

A. That was one of the ways.

Q. Did you have any other?

A. I believe the circuits could be traced from the substation.

Q. Were they?

A. I think they were, yes, sir.

Q. Did you take into consideration that if there was no competitor in that particular field what the value of the Ohio Public Service Company property might be in Orrville?

A. No, sir, we made a valuation of the physical plant.

Q. You know from your experience that a commission with a competitor in the field, where there is a demand that can be supplied by one operator in that field immediately interferes with the business of the one originally in the field?

A. No answer.

Q. This particular field could be supplied by the one company?

Objected to; sustained; exceptions.

Redirect examination.

By A. H. Etling:

Q. As to the question of the value of property not used or useful if not used or useful in this business, it could be sold and its value obtained?

A. Yes, sir, it could be sold for what they could get for it. We put on a value there that it would cost to reproduce the plant at the present day, less its depreciation.

[fol. 134] Q. Does that value of \$11,000.00 include both public and private lighting within the village of Orrville and equipment?

A. This value of \$11,000.00 approximately shown on page 1, is the plant that is used and useful inside the corporation.

Q. It includes public and private lighting?

A. Mostly private lighting.

Q. All the private and public lighting used and useful?

A. Yes, sir.

Q. Does your appraisal show the amount of the investment in this property?

Objected to.

Recross-examination.

By C. H. Henkel:

Q. Exhibit 1 is the usual statement prepared for rate making purposes; isn't that true?

A. Possibly rate making purposes would go a little farther than that, a balance sheet and expenses.

Q. You would likely if this was before the Public Utilities Commission in addition to Exhibit 1, you would have given the concern a value to the cost and expense of outaging the business?

A. In some cases there is a per cent added for that.

Q. Let us go to this other question again that we have been discussing and that is this, as you appraised this prop-

erty you looked at it as bare physical property, is that not true?

A. The physical value is shown on page 1. It is shown towards the middle of that set up.

[fol. 135] Q. You carry nothing into this valuation of a going concern, do you?

A. There is nothing on here set up as such.

Q. Did you hear the statement made by Judge Pardee a moment ago?

A. Yes, sir.

Q. His conclusion and deduction is correct, is it not, as to the physical plant?

A. There are added to the plant values such as engineering contingencies, tool and supply expense, a sub-total made to that for the total physical plant. The figures for the total plant, \$13,518 for reproduction value, is obtained from page 3, which is a summary of the various accounts which go to make up the accounts; to that add contingencies, tool and supply expense which are a part of the physical plant and that makes a total reproduction of \$15,276. Then the further overhead construction, taxes, working capital and supplies, so we enter the grand total of the plant inside the corporation as \$17,338.

Re-redirect examination.

By A. H. Etling:

Q. On the valuation of poles, do you take into consideration the labor for setting that pole?

A. Yes, sir, material, price, plus freight, cartage, and all the labor connected with it.

Q. That is true of all the equipment?

A. Yes, sir.

Thereupon court adjourned until 9 A. M. next day.

At 9 A. M. the following day court opened.

[fol. 136] And, further, the Relator, to maintain the issues on its part, called the witness, W. R. Cook, who, being first duly sworn, testified as follows:

Direct examination.

By A. H. Etling:

Q. You may state your name?

A. W. R. Cook.

Q. Where do you live?

A. Orrville, Ohio.

Q. By whom are you employed?

A. The Village of Orrville.

Q. In connection with the electric light plant?

A. Yes, sir.

Q. How long have you been employed by the Village of Orrville?

A. Fourteen years.

Q. In what position were you employed by the Village of Orrville 14 years ago?

A. As superintendent of the water works.

Q. When did you have something to do with the electric light plant?

A. In 1916.

Q. In what capacity?

A. Superintendent.

Q. You have been superintending the light plant since that time?

A. Until a couple of months ago.

Q. Have you examined this appraisal that we presented the court yesterday?

A. I have.

Q. What would you say as to the appraisal of property in that appraisement? As to whether it was high or low or proper?

A. Some parts seems to be high, and some parts seems to be low.

[fol. 137] Q. What portion especially is priced high?

A. They have an engine and a generator and some boilers I would—

Court: What do you claim for those?

Etling: We want to show to the court through Mr. Cook that the appraisal that has been presented is not lower than the real value of the property.

Q. If you can, state what is the real value of the whole property?

A. It would be salvage value.

Q. You have noticed in this appraisal, it has been appraised at a certain fixed sum at eleven thousand nine hundred and some dollars; is that appraisal high or low?

Objected to; sustained; exceptions.

Q. Is that a fair appraisal?

Objected to; sustained; exceptions.

Q. What in your opinion is the fair total appraisement of that property?

A. As I stated before, I believe it balances up correctly; taking it all.

Q. Can you give the value in figures?

A. I can't off handed.

Q. You did look over this appraisal?

A. Yes, sir.

Q. From the figures you saw at that time, you thought it would balance up fair?

A. Yes sir.

Q. Will you tell the court the condition of the poles and wires of the Public Service plant in Orrville?

Objected to; sustained; exceptions.

Q. State to the court as to the condition of the poles as being *as being* proper and poles missing; what has happened to the plant?

A. The depreciation has been very great, and the length of time it stood idle and the parts they have not used. A number of poles have been removed by their consent. We have removed some of them when they became dangerous. I have sent men out to do it.

Q. State to the court about poles falling of their own accord across street live wires?

A. That has happened in three or four instances and we fixed them up for them because they did not maintain a

lineman all the time. He worked eight hours on the railroad and the balance of the time for the Public Service Company. He could not get to it and we went out to remove the danger for them.

Q. State to the court whether the lines are continuous on the poles?

A. Some of them are and some of the spans are cut out and abandoned.

Q. For instance, on Walnut Street, the length of about how far would you say in Orrville the length of the street north and south, the whole way along the street?

A. On South Walnut Street it is abandoned; on North Walnut Street it is still in use.

Q. What distance?

A. About four blocks in use.

Q. How far not in use?

A. Probably eight blocks.

Q. When you said four blocks in use, what kind of use is that?

A. They had a line where they were running to the creamery and the cement factory down there that still has power in it.

Q. Are they furnishing current to anybody there?

A. No, sir, but the line is still energized.

[fol. 139] Q. What would you say about the system on South Main Street?

A. From the square they have no line energized at the present time. It has been taken down, most of it.

Q. What about poles on South Main Street?

A. One here and there.

Q. Without wires?

A. Mostly.

Q. What on North Main Street?

A. North of the square they have three poles at Arch Street. They are still standing with the lines on it, but no current going through them.

Q. Take North Vine Street, what is the condition there?

A. From Main Street on North Vine Street to Water Street their line is energized; no service on it.

Q. What is the condition on South Vine Street?

A. They have no line on that street only at one point; that line intersects South Main Street one block; that is energized.

Q. What is the condition of the line on West Market Street?

A. It is about the same all over, only that is a higher line.

Q. If you can, state to the court how much service there is in Orrville from this whole system?

A. I am unable to do that. I never kept track of their business that way.

Q. You have never counted them up?

A. No, sir, not accurately.

Q. State to the court what difference, if any, there was in the efficiency of the service before the abandonment of [fol. 140] the central plant and after the abandonment of the central plant?

Objected to; overruled; exceptions.

A. I think you have a complete record of the outages.

Q. The comparison before and after?

A. It was always an advantage in having a central plant, because your plant is centrally located. You will not have as good service in long transmission; you can't get to it as quick. Before that time there was quite a good deal of trouble, I never investigated it. The service was not as good.

Q. During this period from 1913 to 1917 did you as superintendent of that plant have communication and conversation with employes of the Massillon Electric and Gas Company relative to the inefficient service at any time?

Objected to; sustained; exceptions.

Q. What conversation, if any, did you have with the employes of the Massillon Electric and Gas Company relative to their service in Orrville after the abandonment of the central plant?

Objected to; sustained; exceptions.

Q. And after you became superintendent of the municipal light plant?

Objected to; sustained; exceptions.

Q. Has this central plant as originally built in Orrville been abandoned for use in lighting?

Objected to; question withdrawn.

Q. Describe the condition of the central plant at Orrville [fol. 141] at the present time?

A. It has been abandoned and parts of it has been removed and parts of it is there.

Q. Tell the court what parts are there?

A. Engine, generator, boiler feed pump and part of the switchboard.

Q. In what condition are they?

A. Very poor condition.

Q. Are they fit for service at all?

A. The plant has deteriorated from not being in use and they have an engine and generator, part of a switchboard, two boilers, a feed boiler, feed pump still in the building.

Q. Any employees around there?

A. One employe and the building stands open.

Q. What do you mean?

A. The doors open and the windows mashed in.

Q. Is this machinery that you have mentioned connected with the lighting system of Orrville?

A. Not at the present time.

Q. Is it a single phase system?

A. Yes, sir.

Q. Could that machinery be connected with the system that the Ohio Public Service Company now have?

A. It could for lighting purposes only.

Q. What phase system does the Ohio Public Service Company have on their poles and lines now?

A. Three phase.

Q. Could this one phase system be connected with this?

A. Yes, sir, it would be used for lighting only.

Q. What is the building used for?

A. It is used for a storehouse.

Q. For what?

A. Anything that they have in the line of fixtures. I [fol. 142] don't think they will have much of anything now.

Q. How long has this building and machinery been in the condition you have stated, disconnected?

A. I am unable to give you the date on that.

Q. How many years back are you there? Has it been since they brought the power in from Massillon?

A. I think it would be, yes, sir, but I am not positive about that.

Q. Has it been a number of years? Since they brought it in there and put in the three phase system?

A. Yes, sir.

Q. Did you notice a hitching post and ring in front of the place?

A. Yes, sir.

Q. Would that indicate how modern the plant is?

A. No answer.

Q. From where does the current come that is supplied by the Ohio Public Service Company at the present time?

A. They have a sub-station in the southern part of Orrville. Then they have a transmission line that comes from Massillon.

Q. Through what points does that transmission line pass?

A. I don't believe it passes directly through any.

Q. What towns are furnished that current?

A. Dalton, Ohio, receives current from it.

Q. Any other place?

A. Not that I know of.

Q. Does this through line from Massillon furnish any other place?

A. Yes, sir. Wooster, Fredericksburg, Shreve and surrounding towns here, Smithville and Apple Creek.

[fol. 143] Q. Do you know whether or not that line goes through Wooster and beyond Wooster?

A. I don't.

Q. The points that you have named aside from the Village of Dalton, are what direction on the line from Orrville?

A. Wooster is directly west.

Q. They are all west?

A. Yes, sir.

Q. Any other towns besides Dalton that are furnished east?

A. I believe Greenville and West Brookfield.

Q. How about North Lawrence?

A. I believe they furnish Bodill.

Q. Would the abandonment of the lines in Orrville affect the service by this company of these other towns?

A. I don't think so. That would not have any effect on it.

Q. Would they have to build a line around Orrville or anything of that kind?

A. No.

Q. A sub-line to Orrville?

A. Yes, sir.

Q. Orrville was not on the main line?

A. No, sir.

Q. What distance is it off from the main line?

A. Very close to three-quarters of a mile.

Q. In that three-quarters of a mile there are no towns that they serve?

A. No, sir.

Q. This line south of Orrville runs more or less west from the sub-station below Orrville?

A. Yes, sir.

Q. While the line running into Orrville runs in what direction?

A. North.

Q. At right angles to the other line?

A. Yes, sir.

Q. In order to supply what is known as the creosote plant outside of the corporation of Orrville, would it be necessary [fol. 144] to build a new line from the main line south of Orrville north, or could it be carried over the line as it exists now outside the municipality?

A. Yes, sir.

Q. So that the wood preserving plant could be served without the construction of a new main line south? From the station south of Orrville at the Wheeling & Lake Erie?

A. They could build one across there.

Q. Is there not one built there now to the Village of Orrville?

A. Yes, sir, to the Village of Orrville.

Q. At the present time the creosote plant is furnished, then the Village of Orrville?

A. Yes, sir.

Q. It could be furnished direct from this line south of Orrville?

A. Yes, sir.

Q. Going a little east from this line to the corporation line at Orrville and then north?

A. Yes, sir.

Cross-examination.

By C. H. Henkel:

Q. You say you were employed by the Village of Orrville for the last 14 years?

A. Yes, sir.

Q. Did you know that in 1910 the Orrville Light, Heat and Power Company was furnishing current for public lighting and private consumers in Orrville?

A. Yes, sir.

Q. Thereafter, and on or about 1913 the Massillon Electric and Gas Company furnished current to public lighting and private consumers in the village?

A. Yes, sir.

[fol. 145] Q. It had at that time a system available and which was in use in furnishing that service, did it not?

A. Yes, sir.

Q. The village constructed a lighting plant starting in 1914, which was completed in 1916?

A. Yes, sir.

Q. And the current was turned on in 1916?

A. Yes, sir.

Q. You then became superintendent of the light plant?

A. Yes, sir.

Q. Thereafter, the Massillon Electric and Gas Company no longer operated public lighting in the village, did it?

A. They did for a while until their contract expired.

Q. If the Massillon Company did continue it was for a brief period of time?

A. Until their contract expired.

Q. Thereafter, the village furnished the current for the municipal lighting?

A. Yes, sir.

Q. The village also took on private consumers?

A. Yes, sir.

Q. And has since that time put forth every effort to take on private consumers?

A. Yes, sir.

Q. The Ohio Public Service Company has ever since 1921 had property in the Village of Orrville?

A. Yes, sir.

Q. And has had consumers there?

A. Yes, sir.

Q. And has at least attempted to render a service to the consumers of the Village of Orrville?

A. Yes, sir.

Q. Your village plant has also used some of the property belonging to the Ohio Public Service Company and its [fol. 146] predecessors in the village? Poles, cross arms and other equipment?

A. There may be one instance where a gentlemen's agreement between the local manager and myself in order to expedite matters.

Q. Also places where poles of the Ohio Public Service Company were setting that were then removed and poles placed there by the village?

A. No, sir.

Q. Where you have testified to several lines of the Ohio Public Service Company being at the present time out of use, in that particular locality the village has lines that it is now using for the same purpose, has it not?

A. Yes, sir.

Q. Your attention was directed to the outages; as I understand from your testimony you were not able to say to the court whether or not the outages were due to the elimination of the central plant or other causes?

A. I don't recall how I did answer that question. I think I said you did not get as good service.

Q. I thought you said you did not know what caused the outages?

A. Yes, sir.

Q. You are familiar with the development of the arc and transmission of the electric current at the present time?

A. Yes, sir.

Q. At the present time the current is brought by the Ohio Public — Company to Orrville over these high transmission lines, it is not?

A. They maintain a high transmission line.

Q. Did you know that the line was constructed for the purpose of rendering a service to the Village of Orrville [fol. 147] and the inhabitants thereof?

A. I never knew particularly that it was for that particular reason.

Q. Don't you know that the Ohio Public property stops near the Village of Orrville?

A. No, sir.

Q. Don't you know this is a line belonging to other people that was extended over there by other capital in order to get it from the Ohio Public Service Company?

A. I understand there was one built there recently.

Q. When you testified you did not mean to say that you knew who constructed these lines and that the Ohio Public Service Company is merely using a high transmission line into Orrville as part of the line that is extended on to Wooster or Shreve or some other place?

A. I don't know.

Redirect examination.

By A. H. Etling:

Q. Do you know as to whether the Ohio Public Service Company is furnishing current over these lines and to these cities that you mentioned?

A. Yes, sir, they are.

Q. Have you stated to the court in answer to Mr. Henkel's question as to whether or not you did have any knowledge as to the cause of the outages in Orrville after the abandonment of the central plant?

A. Just from hearsay. I heard it was from accidental causes, the wind blowing over the wires.

Q. These exceptional outages occurred after the building of this long distance line?

A. Yes, sir.

[fol. 148] Court: Was the plant of this company at Orrville which is not now in operation, was that in operation when the city began the construction of its plant?

A. No, sir.

Q. How long a time before the city began the construction of its plant, was there agitation in the city for a municipal plant?

A. My recollection is it has been going on for a great number of years. The real climax was when the Massillon Electric had taken over the property of the Orrville Light, Heat and Power Company.

Q. When was that?

A. Nineteen thirteen. They boosted the rates. They started it.

Q. From that time on it was definitely settled that the city was to build its own plant?

A. They circulated a petition and nearly everyone they took it to signed it, and the council passed the necessary legislation.

Q. At that time this plant that has now been abandoned was in operation and furnishing electric energy to the inhabitants of that city?

A. No, sir, they had stopped the operation of that plant at that time and was furnished energy from Massillon.

Q. Did they stop the operation of that plant before it was very evident that the city was going to erect its own plant?

A. Yes, sir.

Recross-examination.

By C. H. Henkel:

Q. I asked you whether or not at the time the village constructed its light plant, if at that time the Massillon Electric and Gas Company was not furnishing a service to the [fol. 149] municipality by way of public lighting and the inhabitants of that community, and did you not answer yes?

A. Yes, sir.

Q. Wasn't the question put to you whether or not this company was rendering a service to the people of that community and the municipality itself at the time the village plant was constructed? I thought you said no?

A. No, sir.

And, further, the Relator, to maintain the issues on its part, called the witness ALFRED JENNY, who, being first duly sworn, testified as follows:

Direct examination.

By L. R. Critchfield:

Q. You may state your name?

A. Alfred Jenny.

Q. You are clerk of the Village of Orrville?

A. Yes, sir.

Q. How long have you been clerk?

A. 12 years.

Q. That was during the time that the Massillon Electric & Gas Co. was furnishing electricity to Orrville?

A. Yes, sir.

Q. Have you any account during that period of the outages on the street lighting system of the Village of Orrville?

A. Yes, sir.

Q. In what form of memorandum have you to inform the court?

[fol.150] (The Respondent admits, etc. This is contained in the agreed statement of facts.)

Q. You were a resident of Orrville before the Central lighting plant was discontinued in Orrville?

A. Yes, sir.

Q. You have been a resident since?

A. Yes, sir.

Q. State what was the difference in service rendered in street lighting before the central plant was discontinued and afterwards?

A. The service before was bad enough and it was worse after.

Counsel for Respondent asks that the answer be stricken out; sustained; exceptions.

Q. What kind of service did you have before the central lighting plant was discontinued in Orrville? Or, if you prefer, you can compare it but not in the same answer that you gave before?

A. The service before was tolerable.

Q. How was it after the central plant was discontinued?

A. It was not so good.

Q. What do you mean by that?

A. If you want me to say how I judged that I will do so. There were less outages deducted from the bills of Rennecker than from the Massillon Electric & Gas Co. The outages were greater as deducted from the bills of the Massillon Electric and Gas Co.

Q. This Exhibit Z will show what you mean by way of outages from the Massillon Co.?

A. Yes, sir, a complete record of it.

[fol. 151] Cross-examination.

By C. H. Henkel:

Q. You don't mean to tell us what the cause of those outages might be?

A. No, sir.

Q. You are not an engineer?

A. No, sir.

Q. You don't know what caused it?

A. No, sir.

Q. You have testified that certain outages allowed you have a voucher, I believe those vouchers show the amount paid to the Massillon Electric Co. for public lighting?

A. Yes, sir.

Q. From Feb. 2, 1914, up to and including July 2, 1917, do they not?

A. Yes, sir.

Q. During the time indicated on Exhibit Z the Massillon Electric & Gas Company was furnishing service in Orrville, I believe?

A. Yes, sir.

Q. They were lighting the public streets in that time?

A. Yes, sir.

Q. Can you tell me what the total amount that was paid to the Massillon Electric & Gas Company during that time is from the vouchers?

A. I did not run it up.

Q. Could you, by adding them up?

A. Yes, sir.

Q. Will you add them up?

A. Yes, sir, I will. \$10,820.10.

Relator rests.

[fol. 152] Thereupon the Respondent, in reply, called the witness JOHN KLING, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. John Kling.

Q. Where do you reside?

A. Massillon.

Q. What, if any, position have you?

A. I am Assistant Secretary of The Ohio Public Service Co.

Q. How long have you held that position?

A. Since the organization.

Q. You may state whether or not you have in your possession the records of that company showing expenditures?

A. I have.

Q. Have you with you the record showing disbursements made on this Orrville property?

A. Yes, sir.

Q. I will also ask you to state whether or not you have made any investigation of the record and if from that investigation you are able to state what amount of money was expended by the Massillon Electric & Gas Company, predecessors of The Ohio Public Service Co., for the Orrville property?

A. Yes, sir, I have investigated.

Q. Will you kindly state the amount?

Objected to; overruled; exceptions.

Q. If you have that book here will you identify it and tell [fol. 153] by what that is known and from what page you get that item?

A. That record is the general ledger of the Massillon Electric & Gas Co. and the amount spent was originally \$21,251.00.

Counsel for Relator asks that the answer be stricken out; overruled; exceptions.

A. Eleven thousand dollars was paid in money and \$10,000.00 in bonds of the Massillon Electric & Gas Co.

Q. What, if any, other expenditures, as shown by the record, were made at that time or immediately after the acquisition of that property for the betterment and rebuilding of this Orrville company in Orrville?

A. There was a transmission line built in 1913 to supply Orrville, costing \$32,504.00.

Objected to by Relator and asks the court to strike the answer out; sustained; exceptions.

Q. You refer to a certain record, what is that?

A. The general ledger of the Massillon Electric & Gas Co.

Q. You may state whether or not you know it to be a record showing original entries or disbursements for property acquired or purchased by the Massillon Electric & Gas Co.?

A. Yes, sir, I do.

Q. Where is it kept?

A. In the office of the Massillon Electric & Gas Company.

Q. State, if you know, what company became the successors of the Massillon Electric Co.?

A. The Ohio Public Service Company.

Q. You may state to the court whether or not you know that record to have a record of the Massillon Electric & Gas Co.?

A. Yes, sir.

[fol. 154] Q. Did you have anything to do with the making of that record?

A. Nothing.

Q. Do you know from your own knowledge whether or not that is a record of the company and is an accurate record of the matters and things it attempted to show?

A. Yes, sir, I do. I was an auditor of The Ohio Public Service Co. In making an audit of the Massillon Electric & Gas Co. we went over all the old records.

Q. You did not check the entries out of the books as against the physical properties?

A. Yes, sir, I did on the purchase of material, stock and labor. I have investigated all those figures to see that the book entries were proper.

Q. May I inquire whether or not at the time you made that audit you did check over the record that now appears before you?

A. Yes, sir.

Q. Where did you find it?

A. At the Massillon Electric & Gas Co.

Q. Where has that record been since that time?

A. At the Massillon Electric & Gas Co.

Q. State whether or not you know of your own knowledge whether or not this high tension line was constructed for the purpose of rendering a service to the Village of Orrville and the inhabitants thereof?

A. Yes, sir.

Q. You may consult the records and ascertain and state what amount was expended for the construction of that line?

Objected to; overruled; exceptions.

[fol. 155] A. Thirty-two thousand five hundred and four dollars.

Q. Who was that paid to?

A. That was the cost of material, wire, poles, labor entering into the construction of the line from Massillon to Orrville.

Q. It was built for the purpose of supplying power and light to Orrville, but not the sole purpose?

A. At that time it was the sole purpose.

Q. Do you know that of your own knowledge?

A. I do.

Q. Reference has been made to a sub-station. You will consult the record you have and state to the court the amount that was expended for the building of that sub-station at Orrville?

Objected to; overruled; exceptions.

A. Sub-station, 1914, \$2,228.00.

Q. You may state whether or not since 1914 the Massillon Electric & Gas Co. and The Ohio Public Service Co. have expended any sums or amounts in the maintenance or upkeep of this property?

A. Yes, sir, we have.

Cross-examination.

By L. R. Critchfield:

Q. This ledger that you speak of here on page 217 there is some late writing and figures?

A. Absolutely not.

Q. "Cost of property" is later?

A. No, sir.

Q. I ask you if those figures, October 31st \$10,000.00, were put in there and placed there at the time it was all [fol. 156] put on?

A. Yes, sir, October 31, 1913. I investigated all the figures back and found it was issued then.

Q. When did you see those figures in there first?

A. In the first part of this year the second time; the first time in 1921 when we took over the company.

Q. They were there then?

A. Yes, sir.

Q. They are in different ink?

A. Yes, sir.

Q. It looks like fresh writing?

A. I would not say that.

Q. It is not faded like the other figures?

A. It is all like that in the October entries.

Q. The words "cost of property" have been slanted up under the original entry of organization expense?

A. No, sir.

Q. On page 167 of this ledger you see an item of 1913 Oct. 31st General Journal 351 \$10,000.00; do you know what that is and when it was put in there?

A. Yes, sir.

Q. It is the same ink as on page 217 that you read a while ago?

A. Yes, sir.

Q. That General Journal, have you got it with you?

A. I have not, but I can bring it up.

Q. You say the Massillon Gas & Electric Co. built a high tension line from Massillon to Orrville?

A. Yes, sir.

Q. Why didn't they come direct to Orrville instead of coming along the Lincoln Highway south of Orrville?

A. I don't know.

Q. Wasn't it a fact that the plans of this company were to extend their lines west, taking in all the towns along the [fol. 157] Lincoln Highway west, do you know anything about that?

A. No.

Q. Since then they have continued west, The Ohio Public Service Company is serving electricity for towns west of Orrville now? Smithville and Apple Creek?

A. No.

Q. Don't Apple Creek get its power from there?

A. No.

Q. It is contemplated that they are going further west than they are now with their high tension lines?

A. Not to my knowledge.

Q. You say you made no entries on this book?

A. No, sir.

Q. What you know about this book is what you see on these pages?

A. And supporting vouchers and checks and various other supporting papers.

Q. That expense in building the line from Massillon to Orrville, did it take in any other expense than what you have stated?

A. The ordinary supplies of building the line, hardware, etc.

Q. Supervision by officers?

A. A foreman and superintendent in building the line.

Q. If you were not allowed to distribute electricity in Orrville, this line built from Massillon to Orrville would not be a loss to your company, would it?

A. I would not say it would be a loss today.

Q. Do you know how far it is from Massillon to Orrville Junction?

A. About fifteen miles.

Q. How far from Orrville Junction to the Village of Orrville?

A. I would not like to state.

[fol. 158] Q. The character of the line from Orrville Junction to Orrville is different from the line from Massillon?

A. I don't know.

And, further, the Respondent, to maintain the issues on its part, called the witness LEROY STROBEL, who, being first duly sworn, testified as follows:

Direct examination.

By C. H. Henkel:

Q. You may state your name?

A. Leroy Strobel.

Q. What position do you occupy with The Ohio Public Service Co?

A. General line foreman.

Q. How long have you been so employed?

A. I have been with the company 24 years.

Q. Did you have anything to do with the construction of the line from Massillon to Orrville?

A. Yes, sir.

Q. For what purpose was that high tension line constructed?

A. To furnish current to Orrville.

Q. State whether or not that line was constructed over a direct route from Massillon to Orrville?

A. Yes, sir.

Q. Is any portion of that line along the Lincoln Highway?

— No, sir.

[fol. 159] Cross-examination.

By L. R. Critchfield:

Q. It don't go as far south as the Lincoln Highway?

A. No, sir.

Q. It does not run directly into Orrville from Massillon?

A. It is a direct route, yes, sir.

Q. You are three-fourths of a mile south of Orrville?

A. Yes, sir.

Q. Then it goes west?

A. No, sir.

Q. Where does it go to?

A. It goes to Orrville?

Q. Don't it go west?

A. No, sir.

Q. Between Massillon and Orrville lie the towns of West Brookfield, East Greenville, Greenville and Dalton?

A. Yes, sir.

Q. And Bowdil, formerly North Lawrence?

A. Yes, sir.

Q. Does this line furnish electricity to those towns?

A. No, sir.

Q. None of them?

A. No, sir.

Q. Don't they all have branches off from this line?

A. No, sir.

Q. Where does Dalton get its light?

A. Off this line, but the others don't.

Q. When this line was built wasn't it contemplated to take on Dalton?

A. No, sir.

Q. When was Dalton taken on?

A. About a year later.

Q. Since then your company is furnishing electricity to various towns west of Orrville, is it not?

A. To Wooster.

[fol. 160] Q. And it lights up Apple Creek?

A. Don't know anything about that.

Q. It is the current that lights up Fredericksburg and Shreve?

A. The only thing that we furnish west of Orrville is to Wooster; what they do with it I don't know.

Q. The Wooster Electric Company acts as distributor to these towns, but the electric current all comes from your company?

A. No.

Q. Apple Creek, Smithville, Wooster, Fredericksburg, Shreve, all towns west of Orrville the current comes from Massillon through your company?

A. I don't know.

Redirect examination.

By Henkel:

Q. You may state whether or not you have recently made an investigation and if so what that investigation shows as to the use of any of the property of The Ohio Service Co. poles, especially in the Village of Orrville by the Village?

A. We made an inspection along about the 20th of April.

Q. What did you find?

A. That they had some contacts on some of our poles.

Q. Can you give the number?

A. About eighteen.

Recross-examination.

By Critchfield:

Q. That is, the Orrville municipal plant had their wires on your poles?

A. Yes, sir.

[fol. 161] Q. That was due to the fact that you had a pole setting right where they would have placed a pole, your pole not being in use, they tacked an insulator on and strung the wire on?

Objected to; overruled; exceptions.

A. They tacked a bracket on and fastened their wire to it.

Q. It was because your pole was in the road?

A. No, sir, I do not think so.

Q. Did you look to see how many telephone poles your wires were tacked on to?

A. We pay for them.

Q. Did you see how many there were?

A. Not all of them.

Q. How many did you see?

A. I don't know.

Q. You saw a good many?

A. Quite a few.

Q. You pay for the privilege of tacking on?

A. Yes, sir.

Q. If you took your wires off, your obligation to pay would cease?

A. Most assuredly.

By Henkel: If the court please, we have a statement here, counsel don't agree, and we would like to have the record show, and the court can pass upon its competency as to tax valuation of the property of the Massillon Electric & Gas Company in the County of Wayne from 1915 to 1923, inclusive.

Objected to.

OFFERS IN EVIDENCE

By Henkel: We have some municipal records that we wish to introduce and with that we rest.

[fol. 162] Objected to.

Volume 1 of the Ordinance Record, Pages 32 to 36, inclusive.

Volume 2 of the Council Records, Pages 170 to 173, inclusive.

Volume 1 of the Ordinance Records, Page 42.

Volume 2 of the Council Records, Page 192, starting on Page 191.

Volume 1 of the Ordinance Records, Pages 225 to 229, inclusive.

Volume 3 of the Council Records, Page 318.

Volume 3 of the Ordinance Records, Pages 122 to 126, inclusive.

Volume 4 of the Council Records, Page 245.

Volume 4 of the Ordinance Records, Pages 273 to 276, inclusive.

Volume 5 of the Council Records, Page 276.

Volume 6 of the Council Records, Pages 238 and 242

Volume 5 of the Ordinance Records, pages 136 and 137; 150 to 153, inclusive. Page 166.

Volume 7 of the Council Records, Pages 18, 20, 21, and Pages 32 and 33, inclusive.

Relator objects to the introduction of these records as incompetent and immaterial.

By Henkel to Critchfield: Do you admit that the records that have been referred to by volume and page are either the ordinance Records or the records of the Council proceedings of the Village of Orrville, Ohio?

[fol. 163] Critchfield: Yes, sir.

By Henkel: Your objection to the introduction of these records does not go to the record itself or the authenticity thereof, but the question simply of the competency or relevancy of what may appear therein?

Critchfield: That is all.

Objection overruled; exceptions.

Critchfield: The Relator wants to object to any record that is incompetent or irrelevant.

By Henkel: After Mr. Wagner left the witness stand, Judge Pardee inquired of him if his statement was that his company sold all of its assets of every kind and the amount of money received therefor was proportionately distributed among the stockholders; is that true? Mr. Wagner's answer was in the affirmative. Is that right, Judge Pardee?

Judge Pardee: Yes, sir.

By Henkel: Yesterday we made some objections and without desiring to interrupt the court's hearing of the testimony, I don't know that we saved any exceptions, and I would like and I know the court would be willing to give exceptions to any objections that were overruled.

[fol. 164] Court: Granted by the court to either side.

(Here follow some agreements which are contained in the agreed statement of facts.)

Respondent rests.

Relator rests.

[fol. 165] IN COURT OF APPEALS OF WAYNE COUNTY.

[Title omitted]

MOTION TO STRIKE PORTIONS OF ANSWER, etc.—Filed Court of Appeals September 11, 1923; Filed Supreme Court September 25, 1924.

Now comes the Relator and moves the Court, as follows:

First. To require the defendant to strike out of said answer, on page 2, second paragraph, the words, "without any protest or complaint made to the Public Utilities Commission of Ohio."

Second. To require the defendant to set out more fully and definitely in the second paragraph on page 3 of said answer what if any authority was granted to the Massillon Electric and Gas Company to acquire the property of the Orrville Light, Heat and Power Company thru D. I. Rennecker, as attempted to be set forth in said second paragraph, page 3, of said answer.

Third. To require the defendant to separately state and number its defenses in said answer.

(Signed) Critchfield & Etling, Attorneys for Relator.

[fol. 166] IN COURT OF APPEALS OF WAYNE COUNTY

[Title omitted]

MOTION TO STRIKE PORTIONS OF REPLY—Filed Court of Appeals March 20, 1925; Supreme Court September 25, 1924

Now comes the Respondent and moves that the Court require the Relator to strike out of the Reply filed herein, the following portions thereof, this motion being directed to each and every part of the paragraph or portions of paragraphs hereinafter designated, both in whole and in part:

(1) Page 1, second paragraph, the words, "but denies that the organization of said corporation, or the authorization as set forth in said paragraph, gives to the Respondent any franchise rights as claimed by the Respondent, in said Village of Orrville": for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(2) Pages 1 and 2, the third paragraph beginning on page 1, the words, "but denies that any such service rendered by virtue of the power and authority granted by the State of Ohio gives to the Respondent any franchise rights in said village of Orrville, Ohio": for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(3) Page 2, the second paragraph, the words, "but denies that by virtue of the facts stated in said 5th paragraph, the [fol. 167] Respondent acquired any franchise rights in said Village of Orrville, Ohio": for the reason that the same is immaterial, argumentative and constitutes a conclusion of law.

(4) Page 2, third paragraph, the words, "and further says that if they did acquire such alleged rights as set forth in said 6th paragraph, that by virtue of said acquisition, said The Massillon Electric and Gas Company had no franchise rights in said Village to transfer to Respondent at the date of said alleged acquisition and Respondent has now *on* franchise rights as claimed in said paragraph 6 by the Respondent, in the Village of Orrville, Ohio": for the reason that the same is argumentative, immaterial and irrelevant.

(5) Pages 3, 4 and 5, the entire paragraph beginning on page 3 with the words, "And the Relator further says that if the Respondent claims," and ending on page 5 with the words, "except the mere sufferance of said Village of Orrville": for the reason that the same is immaterial, irrelevant and argumentative.

(6) Page 6, first paragraph, the words, "and says that if said order was made by the Public Utilities Commission, as therein alleged, that said Public Utilities Commission had no power to make the same and the same was null and void": for the reason that the same constitutes a legal conclusion.

(7) Page 8, the second paragraph, starting with the words, "The Relator in reply to paragraphs 14, 15, 16, 17 and 18 of said Answer," and ending with the words, "up to the present time": for the reason that the same tenders no issue whatever and is improper, irrelevant and immaterial.

(8) Page 10, the last paragraph, all of pages 11 and 12 and the first paragraph on page 13, starting with the words, "The Relator further says in reply to the answer of the Respondent that" on page 10, and ending with the words, "and forfeited all rights thereunder before and up to and at said July 15, 1917" on page 13; for the reason that the same is wholly immaterial and irrelevant.

(9) Page 13, second paragraph, and page 14, the first paragraph, beginning with the words, "Relator further says in reply to said Answer" on page 13, and ending with the words, "that of public lighting" on page 14; for the

[fol. 168] reason that the same is irrelevant and argumentative.

(10) Pages 14 and 15, that part thereof which begins with the words, "The Relator for further reply to the Answer of the Respondent says," and ending with the words, "and electrical equipment for any purpose since said date of June 19, 1923"; for the reason that the same constitutes a legal conclusion.

(11) Page 16 and the first paragraph on page 17, beginning with the words, "The Relator further says in Reply to said Answer of the Respondent" on page 16, and ending with the words, "by virtue of the facts above stated" on page 17; for the reason that the same is immaterial and redundant.

(Signed) Franklin L. Maier & C. H. Henkel, Attorneys for Respondent.

[fol. 169] IN COURT OF APPEALS OF WAYNE COUNTY

EXHIBIT B IN EVIDENCE

(Copy)

Deed. #53385. \$3.00 Paid

Massillon Electric & Gas Co.

to

Ohio Public Service Co.

Know all men by these presents: That the Massillon Electric and Gas Company a Corporation, by H. H. Ross its Secretary, hereunto duly authorized and empowered, in consideration of ten dollars (\$10) and other good and valuable considerations, the receipt whereof is hereby acknowledged, and which was paid to it by The Ohio Public Service Company, does hereby grant, bargain, sell and convey to the said The Ohio Public Service Company, its successors and assigns, forever, the following described real estate, situated in the State of Ohio: parts of lots

(now known as out lots) fifty one (51) and fifty two (52) in the City of Massillon, county of Stark, described as follows: Commencing at the northwest corner of the intersection of South Erie and Walnut Streets; thence north along the eastern boundary of said lot which is also the west line of Erie Street to an iron stake twenty five feet from the northeast corner of the building known as the Car Shop, said stake being also 49 feet south of the southeast corner of Russell & Co.'s engine paint shop; thence westerly parallel with the north line of said lot numbered fifty two (52) to the east line of the berme bank of the Ohio Canal; thence southerly along the east line of the berme bank of the Ohio Canal to the north line of Walnut Street; thence easterly along the north line of Walnut Street to the place of beginning said out lots being part of Fractional Section number seventeen (No. 17), Tp. No. 10, Range 9. (Perry Township), Stark County, Ohio, and being the same property conveyed by Russell & Company to the Massillon Light, Heat and power Company by Warranty Deed signed and acknowledged February 11th, 1892, and recorded in Volume 295, page 493 of the deed records of said Stark County; Also, part of a lot in the Township of Tuscarawas, County of Stark, described as follows:

Being a part of the South east quarter of Section No. 1, Township 12, Range 10 and also part of the N. E. quarter of Section 12 of the same township beginning at the N. W. corner of the N. E. quarter of said section 12, at a stone; thence north 5 degrees east one and 755/1000 chains to a [fol. 170] pin in the center of the Wooster Road; thence south $85\frac{1}{2}$ degrees east, 16.615 chains to a point in the center of the Wooster Road and being the true point of beginning of the tract of land so to be conveyed to said company; thence south $4\frac{1}{2}$ degrees west, 65 feet thence north $85\frac{1}{2}$ degrees west 34 feet; thence north $4\frac{1}{2}$ degrees east 65 feet, thence south $85\frac{1}{2}$ degrees east 34 feet to the place of beginning, being the same property conveyed by deed of A. Hershey Bowman to the Massillon Electric & Gas Company recorded in Volume 559, page 47 of the records of Stark County; Also, part of a lot in the Village of Navarre, County of Stark, described as follows: The west $\frac{1}{2}$ of lot number 41 in the Village of Navarre as the same

was laid out, platted and recorded as William S. Wetmore's second addition to the town of Navarre, Ohio, and the same premises described in a deed from Dwight Jarvis, attorney for Mary Upham to Elizabeth Wolf dated the 5th day of July 1854; or the whole of lot No. 267 according to the numbering of lots in the village of Navarre, O. as now numbered on the plat of said Village, being the property conveyed by deed of John W. Zintsmaster to Robert R. Choate, recorded in Volume 499, page 541 of the records of Stark County; Also, the following described premises, situate in the Township of Greene, County of Wayne, described as follows: Being a parcel or tract of land 50 ft. square, in the N. W. Corner of an acre tract of land, fronting on Sassafras Street, 50 ft. said square tract being of the following described acre tract of land herein conveyed. And known as a part of the east part of the south part of the S. E. quarter of Section 25, Township 17 of Range 12, Commencing at a point on the east line of said quarter, 1 chain and $10\frac{1}{2}$ links north from the S. E. corner of said quarter; thence on the said E. line, 2 chains and $8\frac{1}{3}$ links; thence west and parallel with the south line of said quarter, 3 chains and $55\frac{1}{2}$ links; thence south and parallel with the E. line of said quarter 2 chains and $8\frac{1}{2}$ links; thence east and parallel with the south line of said quarter, 3 chains and $55\frac{1}{2}$ links to the east line of said quarter, being the place of beginning, containing 1 acre of land, be the same more or less, but subject to all legal highways, being the same property conveyed by deed of Mary S. McDowell to [fol. 171] The Massillon Electric & Gas Company, recorded in Volume 168, page 383 of the records of Wayne County; Also the premises situate in the City of Orrville, County of Wayne, described as follows: Being a part of lot 215. The portion hereby conveyed being 33 ft. off the east side of so much of said lot No. 215 as lies north of the right of way of the W. L. & E. R. R. Co.'s right of way. Said north line of said right of way being 33 feet from the center of the main track as located on the 16th day of January, 1884, except such part of said 33 foot strip as now lies north of the post and board fence enclosing the yard in front of the building now on said lot and which said north line of the strip, hereby conveyed is further marked by a stone set the first day of July, 1907, at the N. W. corner of said yard

fence, which said stone is 81 ft. 8 in. north from the S. W. corner of the building now on said lot; and a line drawn due east from said stone to the east line of said lot would mark the northern boundary line of the strip hereby conveyed, grantors hereby covenant that all the remaining portion of said lot 215, lying north and west from the portion hereby conveyed shall be perpetually kept open and by them and their assigns for common use as a driveway in connection with the alleys to the N. W. of said lot, Reference is hereby made to the Wayne Co. deed records, Vol. 145 page 451 and Vol. 156 P. 213; Also all of the remaining portion of said lot No. 215, in the city of Orrville lying north and west from the portion above described, Reference is hereby made to the Wayne Co. O. Deed records Vol. 164, page 450 being the property conveyed by deed of D. I. Rennecker and wife to The Massillon Electric & Gas Company, recorded in Volume 168, page 15 of the records of Wayne County, together with, all and singular, electric light and power plants gas distribution system, and the improvements, structures, fixtures, buildings stores, machine shops, repair shops, and other shops equipment, conduits, mains, tubes, engines boilers, regulators, meters, poles, machinery, carriages, trucks, horses, harness, implements, furniture, materials, coal, wood, oil, fuel, and other supplies, maps, drawings, profiles, records, deed and all franchises, rights, [fol. 172] privileges, easements, licenses, contracts, agreements, consents, leaseholds, trade rights, good-will, accounts and bills receivable, patents and patented inventions and processes, and all other interests of the grantor; and of which personal property is hereby declared to be fixtures and appurtenances; and also all present or future improvements and additions made or to be made upon and to any or all of said electric-lighting, gas light and power plants, lands and property, real and personal, and any and all equipment therefor and renewals or replacements of the same or of any part thereof or of the appurtenances; and also all other gas, light and power plants, lands, properties, right and privileges of the grantor, and all and singular the tolls, fares, rents, issues, earnings, income, profits and other benefits and advantages of, or in any wise growing out of, all or any of the said several properties and franchises, and all and singular the tenements,

hereditaments and appurtenances to any of the said properties, belonging, or in any wise appertaining, and the reversion or reversions, remainder or remainders thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the grantor, in and to the same and every part and parcel thereof with the appurtenances. Subject, however to five hundred and thirty three thousand dollars (\$533,000) principal amount of the bonds of the grantor secured by a mortgage of the grantor to the New York Trust Company as Trustee, dated July 1, 1916, a lien upon the property above described. To have and to hold the same to the only proper use of the said The Ohio Public Service Company, its successors and assigns forever. And the said The Massillon Electric and Gas Company, for itself and for its successors and assigns, does hereby covenant with the said The Ohio Public Service Company, its successors and assigns, that it is the true and lawful owner of said premises and has full power to convey the same, that the title so conveyed is free and unincumbered except as hereinbefore stated, and further that it does warrant and will defend the same against all claim or claims of any and all persons whomsoever. In Witness Whereof, the said The [fol. 173] Massillon Electric and Gas Company, a corporation, by its president and Secretary, hereunto duly authorized, has hereunto set its name and affixed its corporate seal this 29th day of October, in the year of our Lord one thousand nine hundred and twenty one.

The Massillon Electric and Gas Company, by H. H. Ross, President, and C. L. Butler, Secretary.
(Seal the Massillon Electric and Gas Company,
Ohio, Incorporated, 1908.)

Signed and acknowledged in the presence of H. A. Mackenzie, C. C. Donns.

STATE OF OHIO,

Cuyahoga County, ss:

Be it remembered, that on the 29th day of October, A. D. 1921, before the subscriber, a notary public within and for said county, personally came H. H. Ross, who is president of said The Massillon Electric and Gas Company, and C. L.

Butler, who is the Secretary of said Company and acknowledged that the name of said Company was subscribed to the foregoing instrument and that the seal affixed thereto is the corporate seal of said Company and that the corporate name was subscribed and said seal attached to the foregoing instrument by the direction and authority of said Company, and that the foregoing conveyance is the free act and deed of said The Massillon Electric and Gas Company, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

C. C. Donns, Notary Public. (Notarial Seal, Cuyahoga County, Ohio.)

Received and recorded October 31, 1921, at 1 o'clock
P. M. O. D. Bruce, Recorder.
(Vol. 190, Page- 334-337.)

STATE OF OHIO,

Wayne County, ss:

I, Jesse W. Ebert, County Recorder within and for said County, and in whose custody the records of said County [fol. 174] are kept, do hereby certify that the foregoing is a true copy of a Deed given by Massillon Electric & Gas Co., to Ohio Public Service Co. Recorded in Vol. 190 pages 334 to 337

And I further certify that the foregoing has been compared by me with the original record in said Volume 190 and pages 334 to 337 and that the same is a true and correct copy.

In testimony whereof, I hereunto subscribe my name officially and affix my official seal, at the Recorder's Office, at Wooster, O., this 27th day of May, A. D. 1924.

Jesse W. Ebert, Recorder. (Seal Recorder's Office,
Wayne County.)

Assignment by the Massillon Electric and Gas Co. to the Ohio Public Service Company of the Franchise, Rights, and Privileges in the Village of Orrville, Wayne County, Ohio, Dated February 1st, 1892.

Assignment

The Massillon Electric & Gas Company, a corporation duly organized under and by virtue of the laws of Ohio, and having its principal office and place of business in the city of Massillon, Stark County, Ohio, for the consideration of One Dollar (\$1.00) and other good and valuable considerations received to its full satisfaction of The Ohio Public Service Company, its successors and assigns, a corporation organized under the laws of the State of Ohio, does hereby sell, assign, transfer and set over unto said The Ohio Public Service Company, all of its right, title and interest in and to its franchise rights and privileges in the Village of Orrville, Wayne County, Ohio, however the same may be evidenced or created and particularly all of its right, title and interest in and to a franchise granted to Ansel P. Gans and Melville D. Wilson, their associates and assigns on February 1, 1892.

This assignment is made subject to all the covenants, terms, conditions and obligations contained in said ordinance above referred to on the part of said Ansel P. Gans and Melville D. Wilson, their associates, successors and assigns to be performed, and subject to all of the other terms and conditions attached to any of the franchise rights and privileges above referred to, all of which The Ohio Public Service Company, by its acceptance hereof hereby assumes.

In witness whereof, said corporation has caused its corporate seal to be affixed and its corporate name to be signed hereunto by its President and Secretary this 28th day of October, A. D. 1921.

The Massillon Electric & Gas Company, by H. H. Ross, President, and C. L. Butler, Secretary. (Seal the Massillon Electric and Gas Company, Ohio, Incorporated, 1908.)

Signed, acknowledged and delivered in presence of H. A. Mackenzie, C. C. Downs.

[fol. 176] STATE OF OHIO,
Cuyahoga County, ss:

Before me, a Notary Public in and for said County, personally appeared H. H. Ross and C. L. Butler, president and secretary, respectively, of The Massillon Electric & Gas Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as president and secretary respectively on behalf of said corporation by authority of its Board of Directors; and that said instrument is the free act and deed of said The Massillon Electric & Gas Company.

In testimony whereof, I have hereunto subscribed my name and affixed my Notarial Seal at Cleveland, Ohio, this 29th day of October A. D. 1921.

C. C. Downs, Notary Public. (Notarial Seal, Cuyahoga County, Ohio.)

Filed Sept. 30, 1924. Supreme Court of Ohio. Seba H. Miller, Clerk.

[fol. 177] EXHIBIT F IN EVIDENCE

-(Copy)

THE PUBLIC SERVICE COMMISSION OF OHIO

No. 362

In re Joint Application of THE MASSILLON ELECTRIC AND GAS COMPANY and THE ORVILLE LIGHT, HEAT AND POWER COMPANY for Authority to Purchase and Sell Property

I, J. B. Dugan, the duly qualified and Acting Secretary of the Public Utilities Commission of Ohio, in whose custody the books, papers, documents and records of said Public Utilities Commission of Ohio are kept, do hereby certify the

following to be full, true, and correct copy of the order issued in Proceeding No. 362 before the Public Utilities Commission of Ohio In re Joint application of the Massillon Electric and Gas Company and the Orrville Light, Heat and Power Company for authority to purchase and sell property.

In witness whereof I have hereunto set my hand and affixed the official seal of the Public Utilities Commission (the successor to the Public Service Commission of Ohio), at Columbus, Ohio, this twenty-first day of March, A. D. 1924.

J. B. Dugan, Acting Secretary the Public Utilities Commission of Ohio. (Seal.)

[fol. 178] BEFORE THE PUBLIC SERVICE COMMISSION OF OHIO

No. 362

In the Matter of the Joint Application of THE MASSILLON ELECTRIC AND GAS COMPANY and THE ORRVILLE LIGHT, HEAT AND POWER COMPANY for Authority to Purchase and Sell Property.

The Massillon Electric and Gas Company, a corporation organized under the laws of the State of Ohio, and The Orrville Light, Heat and Power Company, an unincorporated company engaged in the business of a public utility in the village of Orrville, Wayne County, Ohio, having, on the twenty-fifth day of September, 1912, filed their joint petition for the consent and approval of the Commission for the purchase of all the property together with all rights, privileges and franchises now belonging to said The Orrville Light, Heat and Power Company by said The Massillon Electric and Gas Company, and the time for hearing said matter having been fixed for Wednesday, October second, 1912, at three o'clock P. M., and due notice of the time and place of said hearing having been given, and having been heard on said day and the further consideration thereof continued from day to day, the same came on this day for final consideration upon the petition, the evidence and exhibits.

After considering the pleadings, hearing the evidence, examining the exhibits and making such further and other

inquiry and investigation as the Commission deemed necessary and proper, and it appearing that the service furnished the public will be improved thereby, that the public will be furnished adequate service for a reasonable and just charge, and that no diminution in service will result therefrom, the Commission is satisfied that the prayer of said petition shall be granted. It is therefore,

[fol. 179] Ordered, That said The Orrville Light, Heat and Power Company be, and it hereby is authorized to sell to said The Massillon Electric and Gas Company all of its property, together with all rights, privileges and franchises, as fully set out in the inventory attached to the petition, marked Exhibit "D" and made a part hereof by reference; and said The Massillon Electric and Gas Company hereby is authorized to purchase said property and to pay therefor the agreed price of Twenty Thousand Dollars (\$20,000.00). It is further

Ordered, That said The Massillon Electric and Gas Company file, forthwith, with the Commission schedules of reasonable rates for its service in the village of Orrville, Wayne County, Ohio, and territory adjacent thereto now occupied by The Orrville Light, Heat and Power Company. It is further

Ordered, That the authority here in granted may be exercised after such schedule, or schedules, of reasonable rates have been filed by said The Massillon Electric and Gas Company with and approved by the Commission, and not prior thereto.

The Public Service Commission of Ohio, by O. P. Gothlin, Chairman. J. C. Sullivan, O. H. Hughes, Commissioners.

Dated at Columbus, Ohio, this twenty-third day of October, 1912.

Filed Supreme Court September 30, 1924.

[fol. 180]

EXHIBIT II IN EVIDENCE

[Copy]

Warranty Deed. #24363

D. I. Renneckar and Wife

to

The Massillon Electric and Gas Co.

Know all men by these presents: That whereas, The Orrville, Light, Heat & Power Company, a corporation organized and formerly existing under the laws of the State of Ohio, was duly dissolved on the 24th day of September, 1907, and Whereas, prior to its dissolution it duly conveyed by deed, dated the 1st day of July 1907, and recorded on the 9th day of July, 1907, in the Office of the Recorder, in Volume 156 page 213, of Records of Deeds, to D. I. Renneckar, a part of lot No. 215, in the Village of Orrville, in the County of Wayne, in the State of Ohio, and also by said deed conveyed to said D. I. Renneckar the franchise under which said grantor operated in said village a public utility, and all electric machinery, poles, wires, and lamps, and everything pertaining and belonging to the said lighting plant; and Whereas, the said D. I. Renneckar thereafter carried on the business of said Company; and Whereas, by an order of the Public Service Commission of Ohio, dated the 23rd day of October, 1912, the said D. I. Renneckar, doing business under the name of The Orrville Light, Heat & Power Company, was authorized to sell to The Massillon Electric & Gas Company, a corporation organized and existing under the laws of the State of Ohio, all of said property, together with the rights, privileges and franchises formerly owned by the said Company and then owned by said D. I. Renneckar; and said The Massillon Electric & Gas Company was granted authority to exercise the privileges under this franchise.

Now, therefore, this indenture witnesseth that we, David I. Renneckar (the D. I. Renneckar above referred to in the recital) and Eliza E. Renneckar his wife, both of Orrville, Wayne County, in the State of Ohio, the grantors, in consideration of One Dollar (\$1), lawful money of the

United States, received to our full satisfaction of The Massillon Electric & Gas Company, a corporation organized and existing under the laws of the State of Ohio, with a place of business at Massillon, Stark County, in the State of Ohio, the grantee, do hereby give, grant, bargain, sell [fol. 181] and convey unto the said grantee, its successors and assigns, the following described property, premises, and franchises, situated in the City of Orrville, in the County of Wayne, in the State of Ohio, and more particularly known and described as being a part of Lot No. Two Hundred and Fifteen (215) in said City. The portion hereby conveyed being thirty-three (33) feet off the east side of so much of said Lot Number Two Hundred and Fifteen (215) as lies north of the right of way of the Wheeling & Lake Erie R. R. Company's Right of Way. Said north line of said right of way being thirty-three (33) feet north from the center of the main track as located on the 16th day of January 1884; Except such part of said 33 foot strip as now lies north of the post and board fence inclosing the yard in front of the building now on said lot and which said north line of the strip hereby conveyed is further marked by a stone set the — day of — at the north-west corner of said yard fence, which said stone is ninety-one (91) feet and eight (8) inches north from the South-west corner of the building now on said lot; and a line drawn due east from said stone to the east line of said lot would mark the northern boundary line of the strip hereby conveyed. Grantors hereby covenant that all the remaining portion of said Lot 215, lying north-west from the portion hereby conveyed shall be perpetually kept open by them and their assigns for common use as a driveway in connection with the alleys to the north and west of said lot. Reference is hereby made to the Wayne County, Ohio, deed records, Volume 145, Page 451, and Volume 156, Page 213. Also, all of the remaining portion of said Lot Number Two Hundred and Fifteen (215) in the city of Orrville, Wayne County, Ohio, lying north and west from the portion above described. Reference is hereby made to the Wayne County, Ohio, deed records, Volume 164, Page 450.

Also all the manufacturing business of myself, David F. Rennekar, doing business under the name and the style of the "Orrville Light, Heat & Power Company" (not in-

corporated) of Orrville, Wayne County, Ohio, including the *read* estate above described and any other real estate belonging thereto wherever located, all machinery, fixtures, materials, poles, pole lines, transmission lines, supplies used in connection with said business, and also the good will of said business, all franchises, contracts and agree-[fol. 182] ments and all other property of every sort, kind and nature used or to be used in connection with said business, but excepting (1) all money on hand and in bank and accounts and bills receivable, (2) all office furniture and fixtures located in the Fike Block, Orrville, Ohio, and (3) all residence property and real estate connected therewith.

To have and to hold the above granted and bargained property, premises and franchises, with all the rights, easements and appurtenances thereunto belonging to the said grantee, its successors and assigns, to its and their own use and behoof forever.

And we hereby, each for ourselves, our heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents we are well and truly seized the above described property, premises and franchises, the said property and premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same and every part thereof in the manner and form as above written; that the same are free and clear from all encumbrances whatsoever, and particularly free and clear of all taxes and assessments whatsoever; and that we will and shall for ourselves, our heirs, executors and administrators, warrant and defend said premises with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever, against all lawful claims and demands whatsoever.

And that I, the said Eliza E. Renneckar, wife of said David I. Renneckar, for the consideration aforesaid, do hereby remise, release and forever quit-claim unto the said grantee, its successors and assigns, of all my right and title of or to both dower and homestead in the above described premises.

In witness whereof, we have hereunto set our hands and seals this 11th day of March, in the year of our Lord One Thousand nine hundred and thirteen.

Executed in the presence of F. F. Hunter, Levi Brenne-
man.

David I. Renneckar. (Seal.) Eliza Renneckar.
(Seal.)

STATE OF OHIO,
County of Wayne, ss:

Be it remembered that on the 11th day of March in the year of our Lord One thousand nine hundred and thirteen, [fol. 183] before me, the subscriber, a Notary Public in and for said State and County, personally came and appeared the above named David I. Renneckar and Eliza E. Renneckar, his wife, the grantors in the foregoing deed, who duly and severally acknowledged that they did sign voluntarily the said foregoing deed for the uses and purposes therein mentioned, and that the same is their free act and deed.

In testimony whereof, I have hereunto set my hand and official seal of office at Orrville, in the County of Wayne, on the 11th day of March 1913.

Levi Brenneman, Notary Public. (Notarial seal,
Wayne County, Ohio.)

Received and Recorded March 24th 1913, at 9 o'clock
A. M.

Joseph Sullivan, Recorder.

STATE OF OHIO,
Wayne County, ss:

I, O. D. Bruill, County Recorder within and for said County, and in whose custody the records of said County are kept, do hereby certify that the foregoing is a true copy of a Warrant- Deed given by D. I. Renneckar and wife to The Massillon Electric and Gas Co. Recorded in Vol. 168 Page 15-17.

And I further certify that the foregoing has been compared by me with the original record in said Volume 168 and page 15-17 and that the same is a true and correct copy.

In Testimony Whereof, I hereunto subscribe my name officially and affix my official seal, at the Recorder's Office, at Wooster, O., this 12 day of May A. D. 1913.

O. D. Bruill.

[fol. 184]

EXHIBIT I IN EVIDENCE

(Copy)

Warranty Deed. 12873

Orrville Light, Heat & Power Co.

to

D. I. Renneckar

Know all men by these Presents that The Orrville Light, Heat & Power Company, of the Village of Orrville, County of Wayne in the State of Ohio, in consideration of the sum of Fourteen Thousand (\$14,000.00) Dollars, to be paid by D. I. Renneckar, of the Village of Sherrods-ville, County of Carroll and State of Ohio the receipt whereof is hereby acknowledged do hereby grant bargain, sell and convey to the said D. I. Renneckar his heirs and assigns forever, the following Read Estate, situated in the County of Wayne in the State of Ohio, and in the Village of Orrville and bounded and described as follows: Known as being a part of Lot No. Two hundred & Fifteen (215) in the Village. The Portion hereby conveyed being Thirty-three (33) feet off, the East side of so much of said Lot Number Two Hundred & Fifteen (215) as lies North of the Right of Way of the Wheeling & Lake Erie R. R. Company's right of way. Said North line of said right of way being 33 feet North from the center of the main tract as located on the 16th day of January 1884, except such part of said 33-ft. strip as now lies North of the post and board fence enclosing the yard in front of the building now on said Lot and which said North line of the strip hereby conveyed is further marked by a stone set this day at the North West Corner of said yard fence, which said stone is 91 feet and 8 inches North from the S. W. corner of the building now on said lot; and a line drawn due east from said stone to the East line of said Lot would mark the Northern Bound-ry line of the strip hereby conveyed. Grantors hereby covenant that all the remaining portion of said Lot #215, lying North and West from the portion hereby conveyed shall be perpetually kept open by them and their assigns for common use as a driveway in

connection with the alleys to the North and West of said Lot, including also by this conveyance the franchise under which said Grantors operate in said village. All electric machinery, poles, wires & Lamps, everything pertaining and belonging to said Lamp Plant. Also five years' contract dated July 15th, 1907, for the full term of five years. To have and to hold said premises, with all the privileges and appurtenances thereunto belonging to the said D. I. [fol. 185] Renneckar, his heirs and *and its* heirs, do hereby covenant with the said D. I. Renneckar, his heirs and assigns, that it was lawfully seized of the premises aforesaid; that the said premises are free and clear from all incumbrances whatsoever, and that it will forever Warrant and Defend the same, with the appurtenances unto the said D. I. Renneckar, his heirs and assigns, against the lawful claims of all persons whomsoever.

In Witness Whereof, The said The Orrville Light, Heat & Pr. Co. has caused its name and seal to be hereunto affixed by its President and tested by its Secretary in accordance with its resolution adopted by its board of Directors June 27th 1907, have hereunto set its hand this first day of July in the year of our Lord one thousand nine hundred and seven (1907).

The Orrville Light, Heat & Pr. Co. J. A. Wagner,
President. J. B. Wagner, Secretary. (Corporate
Seal the Orrville Light, Heat & Power Co., Orr-
ville, Ohio.)

Signed and acknowledged in presence of Jessie B. Axx,
Charles E. Axx.

THE STATE OF OHIO,

Tuscarawas County, ss:

Be it remembered, That on this first day of July A. D. 1907, before me, the subscriber, a Notary Public in and for said County, personally came the above named J. A. Warner, Pres. & J. P. Warner Sec'y of The Orrville Light, Heat & Power Company the grantor personally known to me and acknowledged the execution of the foregoing deed and the attaching thereto of the corporate seal of said Company

to be their free and Voluntary act and deed as individuals and their free and Voluntary act and deed as such president and secretary and the free and corporate act and deed of said Company duly Authorized by its Board of Directors. In testimony whereof I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid.

Charles E. Axx, Notary Public. (Notarial Seal, Tuscarawas County, O.)

Received and Recorded July 9th, 1907, at 9 o'clock A. M.
Albert S. Saurer, Recorder.

[fol. 186] STATE OF OHIO,
Wayne County, ss:

I, O. D. Bruel County Recorder within and for said County, and in whose custody the records of said County are kept, do hereby certify that the foregoing is a true copy of a Warranty Deed given by Orrville Light Heat & Power Co. to D. I. Renneckar, Recorded in Vol. 156, Page-213-214.

And I further certify that the foregoing has been compared by me with the original record in said Volume 156 and page- 213-214, and that the same is true and correct copy.

In Testimony Whereof, I hereunto subscribe my name officially and affix my official seal, at the Recorder's Office, at Wooster, O., this 12 day of May A. M. 1913.

O. D. Bruel, Recorder.

[fol. 187] EXHIBIT J IN EVIDENCE

(Copy)

These articles of incorporation of the Orrville Light, Heat & Power Company witnesseth that we, the undersigned all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Orrville Light Heat and Power Company.

Second. Said corporation is to be located at Orrville in Wayne County, Ohio and its principal business there transacted.

Third. Said corporation is formed for the purpose of Lighting the Village of Orrville, in Wayne County, Ohio, by Electricity and to furnish heat and power for other manufacturing purposes.

Fourth. The capital stock of said corporation shall be Twenty Thousand Dollars (\$20,000.00) divided into Two Hundred (200) shares of One Hundred Dollars (\$100.00) each.

In witness whereof we have hereunto set our hands, this third day of January, A. D. 1893.

J. A. Wagner, David King, Geo. W. King, John W. Wagner, J. P. Wagner.

[fol. 188] THE STATE OF OHIO,
County of Tuscarawas, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this Third day of January, A. D. 1893, the above named J. A. Wagner, David King, Geo. W. King, John W. Wagner and J. P. Wagner who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

Geo. W. Betscher, Notary Public. (Seal.)

THE STATE OF OHIO,
County of Tuscarawas, ss:

I, John C. Donahey, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Geo. W. Betscher whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public, in and for said County, duly commissioned and qualified, and authorized as such to take said acknowledgement; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgement is genuine.

In witness whereof I have set my hand and affixed the seal of said Court at New Philadelphia, this 24th day of January, A. D. 1893.

John C. Donahey, Clerk. (Seal.)

[fol. 189] UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State

I, Thad H. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State and found to be true and correct, of the articles of incorporation — the Orrville Light, Heat & Power Company, filed in this office on the 9th day of January, A. D. 1893, and recorded in Volume 60, Page 49, of the Record of Incorporations.

Witness my hand and official seal, at Columbus, this 24th day of May A. D. 1924.

Thad H. Brown, Secretary of State. (Seal.)

[fol. 190]

EXHIBIT K IN EVIDENCE

(Copy)

Resolution

Notice to the Ohio Public Service Company of termination of franchise, granted February 1, 1892, to Aurel P. Gans and Mellville D. Wilson, their associates, successors, and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues, and public places of the village of Orrville, Ohio.

Be it resolved by the Council of the Village of Orrville, State of Ohio, not waiving their claim that said rights, privileges and franchises granted to Aurel P. Gans and Mellville D. Wilson, their associates, successors and assigns, including The Ohio Public Service Company, ceased and

terminated on the 15th day of July, 1917, and not waiving the claim of said Village of Orrville, that said associates, successors and assigns of said Gans and Wilson, including said The Ohio Public Service Company have forfeited all rights, privileges and franchises granted by an Ordinance of the Village of Orrville, Ohio, passed on the first day of February, 1892 and recorded in Volume 1, Page 32 of the Ordinance Records of said Village of Orrville by reason of the abandonment of said rights, privileges and franchises and by not performing the terms and conditions of said franchises, and

Whereas, The Ohio Public Service Company claim to be the successors of Aurel P. Gans and Melville D. Wilson to all the rights, privileges and franchises granted to said Gans and Wilson by virtue of said Ordinance of the Village of Orrville, passed on the first day of February, 1892, and recorded in Volume 1, Page 32 of the Ordinance Records of said Village of Orrville, Ohio, and

Whereas, said Ordinance does not specify the length of duration of said franchise, and

Whereas, said Ordinance has been repealed by said council.

[fol. 191] Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates successors and assigns, including said The Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said The Ohio Public Service Company are hereby notified to remove all of their poles, wires, guy wires, cross arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues and public places of said Village of Orrville, Ohio, within thirty (30) days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29, 1923.

Ordinance repealing an ordinance providing for electric light, heat, and motive power in the village of Orrville, Wayne County, Ohio, said ordinance passed February 1st, 1892, and recorded in volume 1, page 32, of the ordinance records of said village.

Be it ordained by the Council of the Village of Orrville, State of Ohio, and it is hereby ordained:

Section 1. That an ordinance providing for electric light, heat and motive power in the Village of Orrville, Wayne County, Ohio, passed and adopted February 1, 1892, and recorded in Volume 1, Page 32, of the Ordinance Records of said Village, be and is hereby repealed.

[fol. 192] Section 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 18, 1923.

E. L. Kinney, Mayor.

Attest: A. Jenny, Clerk.

Published in the Orrville Courier-Crescent June 22 and 29, 1923.

Filed Sept. 30, 1924. Supreme Court of Ohio.

[fol. 193]

EXHIBIT L IN EVIDENCE

(Copy)

July 16, 1923.

To the Village of Orrville, Ohio, and the Council of said village, Orrville, Ohio.

Attention E. L. Kinney, Mayor; A. Jenny, Clerk.

GENTLEMEN: This is to notify you that the undersigned does not recognize as valid a certain ordinance passed by the Village Council of Orrville on June 18, 1923, under suspension of rules, by which it was sought by said Council to repeal an ordinance providing for electric light, heat and motive power in said Village as passed and adopted on Feb. 1, 1892 and recorded in Volume 1, Page 32 of the

Ordinance Records of said Village nor the resolution passed by said Council under suspension of rules on said date attempting to notify The Ohio Public Service Company of the termination of said franchise granted February 1, 1892 to Gans and Wilson, their associates, successors, *successors* and assigns, and to remove its poles, lines and equipment, wires, guy wires, cross-arms, and all electrical equipment from the streets, lanes, alleys, avenues and public places of the Village of Orrville, Ohio within the period of thirty (30) days from the receipt of a copy of said resolution.

The undersigned regards the passage of both ordinance and resolution as an unwarranted exercise of the legislative power by said Council, and that the same, if enforced, would constitute a taking of our Company's property without due process of law and be violative of the contractual rights and privileges granted by said ordinance and franchise of 1892, and in direct contravention of both the constitution of the State of Ohio and the Federal Constitution.

The undersigned will, therefore, resist by whatever measured may be necessary and legal any attempt on the part of said Village, its officials, servants, employees, or agents, to remove any of said equipment or the property of the undersigned from any of the streets, alleys or public places of said Village, and hereby gives notice that it has not and does not intend to abandon or surrender its rights, or discontinue any of its service in said Village and that it is now ready and at all times has been ready to serve with electric light and power in accordance with the terms of said franchise, the said Village and the inhabitants thereof.

Yours truly, The Ohio Public Service Company. H.

H. Ross, Manager, Massillon Division.

Filed Supreme Court Sept. 30, 1924.

[fol. 195]

Exhibit "M" in Evidence

IN SUPREME COURT OF OHIO

No. 14917

DRAVO-DOYLE COMPANY, Plaintiff in Error,

vs.

VILLAGE OF ORRVILLE, Defendant in Error

Error to Court of Appeals, Wayne County, Ohio

PETITION—Filed May 24, 1915

The plaintiff in error, Dravo-Doyle Company, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and is and has been for two years and longer last past duly authorized to transact business in the State of Ohio; that the defendant in error, the Village of Orrville, is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Ohio.

[fol. 196] Plaintiff in error further says that at the January Term, A. D. 1915, of the Court of Appeals of Wayne County, Ohio, the defendant in error, the Village of Orrville, recovered a judgment against the plaintiff in error in a certain action therein pending wherein this plaintiff in error was plaintiff in error and the defendant in error herein was defendant in error. In said action this plaintiff in error sought to reverse the judgment of the Court of Common Pleas of Wayne County in favor of the defendant in error. A Transcript of the docket and journal entries in said cause, together with the original pleadings, files and bill of exceptions, are filed herewith.

Plaintiff in error says there is manifest error in the record, proceedings and judgment of said Court of Appeals in this, to wit:

1. Said court erred in sustaining the judgment, findings and orders of the Court of Common Pleas.

2. Said court erred in not reversing the judgment, findings and orders of the Court of Common Pleas.

3. Said court erred in not rendering judgment in favor of this plaintiff in error and in rendering judgment in favor of the defendant in error.

4. Said court erred in holding that the answer of the defendant in error set forth a defense in said action in the Court of Common Pleas.

5. Said court erred in holding that Section 3990 of the General Code of Ohio is not in conflict with Article 18 of the Amended Constitution of the State of Ohio.

6. Said court erred in not holding that Section 3990 of the General Code of Ohio was unconstitutional and void.

7. Said judgment is in conflict with and in violation of Article 14 Section 1, of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law.

[fol. 197] 8. Said judgment is in conflict with and in violation of Article 1, Section 10 of the Constitution of the United States, which provides that no state shall pass any laws impairing the obligation of contracts.

9. Said judgment of the Court of Appeals is in conflict with and in violation of Article 1, Section 10 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in that said judgment impairs the obligation of a contract.

10. Said judgment is in conflict with and in violation of Article 14, Section 1 of the amendments of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, in that it deprives this plaintiff in error of property, without due process of law.

11. Said judgment is in conflict with and in violation of Article 1, Section 16 of the Bill of Rights of the State of Ohio, which provides that all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay, in

that it deprives this plaintiff in error of remedy by due course of law for injury done him in his property.

12. Said judgment is contrary to law.

13. Said judgment is contrary to the evidence.

14. Said judgment is contrary to the conceded and agreed facts apparent in the record.

15. Said judgment is in conflict with and in violation of the Constitution of the State of Ohio and the Constitution of the United States.

16. Said court erred in not sustaining the motion of the plaintiff in error for a new trial.

Wherefore plaintiff in error prays that said judgment of the Court of Appeals may be reversed, and that it may be restored to all things it has lost by reason thereof.

Taggart, Weygandt & Ross, S. G. Rogers, Attorneys
for Plaintiff in Error.

[fol. 198] IN SUPREME COURT OF OHIO

APPEARANCES OF COUNSEL

Summons in error is waived and the appearance of the defendant in error herein is hereby entered.

Clyde Merchant and G. A. Starn, Attorneys for Defendant in Error.

IN COURT OF APPEALS OF WAYNE COUNTY

No. 646

DRAVO-DOYLE COMPANY, Plaintiff in Error,

vs.

THE VILLAGE OF ORRVILLE, Defendant in Error

DOCKET ENTRIES

1915, January 20.—Transcript filed.

1915, January 20.—Eight original papers filed.

1915, January 20.—Petition in error filed.

1915, January 20.—Waiver of service filed.

1915, January 20.—Bill of exceptions filed.

1915, February 4.—Three copies brief (plaintiff) filed.

1915, February 4.—Three copies amended brief (plaintiff) filed.

1915, February 16.—Three copies brief (defendant) filed. Summons in error is waived and the appearance of the defendant in error is entered. Village of Orrville, by G. A. Starn and Clyde Merchant, Attorneys for defendant in error.

January Term, 1915, to wit, January 28, 1915—Submitted, council for defendant in error to file reply brief in twenty days from January 27, 1915.

1915, May 6.—Judgment affirmed. J. 2, p. 435.

IN COURT OF APPEALS OF WAYNE COUNTY

JOURNAL ENTRY OF JUDGMENT

The said parties appeared by their attorneys and this [fol. 199] cause came on to be heard upon the petition in error of the said The Dravo-Doyle Company plaintiff in error herein, together with the original papers and pleadings and duly certified transcript of the orders and judgment of the Court of Common Pleas of Wayne County, Ohio, filed therewith in the said cause, wherein The Dravo-Doyle Company was plaintiff and the Village of Orrville was defendant, mentioned and referred to in said petition in error and was argued by council; upon consideration whereof the court finds that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this court that the judgment and proceedings of the said Court of Common Pleas, in said cause in favor of the said defendant in error and against the said plaintiff in error be, and the same are hereby in all things affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered that the plaintiff in error pay the cost of this proceeding in error, taxed at \$— and in default thereof that execution issue therefor.

To all of which findings, judgment and decree and affirm-
ance of said judgment the plaintiff in error excepts and
gives notice of its intention to prosecute error to the Su-
preme Court of Ohio.

Ordered, that a special mandate be sent to the Court of
Common Pleas of Wayne County to carry this judgment,
order and decree into execution.

(Duly certified.)

[fol. 200] IN COURT OF APPEALS OF WAYNE COUNTY

PETITION—Filed January 20, 1915

Plaintiff in error, Dravo-Doyle Company, says that at
the October Term, 1914, of the Court of Common Pleas of
Wayne county, defendant in error recovered a judgment by
the consideration of said court against plaintiff in error in
an action then pending therein, wherein plaintiff in error
was plaintiff and defendant in error was defendant, a
transcript of the docket and journal entry whereof is filed
herewith.

There is error in said record and proceedings in this,
to wit:

1. Said court erred in overruling the motion of plaintiff
in error for a new trial.
2. The facts set forth in said answer are not sufficient in
law to constitute a defense in said action.
3. Said judgment was given for the said defendant when
it ought to have been given for the said plaintiff.
4. Other errors apparent on the record to the prejudice
of the plaintiff in error.

Plaintiff in error therefore prays that said judgment
may be reversed and that it may be restored to all things it
has lost by reason thereof.

Rogers, Mather & Nesbit and Taggart, Weygant &
Ross, Attorneys for Plaintiff in Error.

IN COURT OF APPEALS OF WAYNE COUNTY

APPEARANCES OF COUNSEL

Summons in error is waived and the appearance of the defendant in error is entered.

Village of Orrville, by G. A. Starn and Clyde Merchant, Attorneys for Defendant in Error.

[fol. 201] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

No. 24618

DRAGO-DOYLE COMPANY, Plaintiff,

vs.

THE VILLAGE OF ORRVILLE, Defendant

DOCKET ENTRIES

1915, January 7.—Petition filed.

1915, January 7.—Precipe filed.

1915, January 7.—Waiver of service filed.

1915, January 14.—Answer filed.

1915, January 18.—Reply filed.

1915, January 19.—Agreed statement of facts filed.

1915, January 19.—Motion for new trial filed.

October Term, 1914, to wit, January 19, 1915—Judgment for defendant; petition dismissed; judgment for costs; exceptions; see entry, J. 62, p. 444.

1915, January 19.—Motion for new trial overruled; exceptions. J. 62, p. 445.

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

JOURNAL ENTRY OF JUDGMENT

And afterwards, to wit, on the nineteenth day of January at and during the October Term of said court, A. D. 1914, an entry was made in this cause upon the journal of said court which is in the words and figures following, to wit:

This day this cause came on to be heard on the pleadings and agreed statements of facts, and the parties hereto having waived a jury and agreed to submit this cause to the court, same was submitted upon the pleadings and agreed statement of facts and no further evidence was offered by the parties hereto.

[fol. 202] And the court upon due consideration finds the issues in favor of the defendant. It is therefore considered by the court that the said petition be dismissed and the defendant recover its costs herein expended, taxed at \$—, and that plaintiff pay its own costs, to all of which the plaintiff at the time excepted and still excepts.

This day this cause came on to be heard on the motion for a new trial filed by the plaintiff herein. Upon consideration whereof the court overrules said motion, to the overruling of which motion the plaintiff at the time excepted and still excepts.

(Duly certified.)

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

[Title omitted]

PETITION—Filed January 7, 1915

Plaintiff is, and for the period of two years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and is, and was during said period duly authorized to transact business in the State of Ohio.

Said defendant, the Village of Orrville, is and for the period of two years and longer last past has been, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Ohio.

Plaintiff further says that said defendant, the Village of Orrville, is and during the period aforesaid has been, a village in which there is situated a municipal water works owned and operated by said village, supplying said village [fol. 203] and the inhabitants thereof with water; that within the period aforesaid the co-neil of said village duly authorized an electric lighting plant to be constructed, to

be owned and operated by said village; and there is, and for the period of two years and longer last past has been in existence in said village, a board of trustees of public affairs consisting of 3 members residents of said village which said board of trustees of public affairs is, and during the period aforesaid has been, performing and exercising the powers and duties delegated to said board by the laws of the State of Ohio.

Plaintiff further says that said board of trustees of public affairs duly advertised for bids and proposals for building additions to a certain building already owned by said village, erecting a stack furnishing boilers, engines, generators, pole lines, lamps and other necessary equipment for the building, construction and equipment of an electric lighting plant to be owned by said village, for the purpose of supplying said village and its inhabitants with light, heat and power, which said advertisement was published in the Orrville Crescent Courier, a newspaper of general circulation in said village and in said Wayne County, continuously for two consecutive weeks, commencing on the thirteenth day of January, A. D. 1914; that said notice was in substance and effect that sealed proposals and bids would be received until twelve o'clock, noon, on the twenty-eight day of January, A. D. 1914, by the board of trustees of public affairs of the Village of Orrville, at the office of said board, for building additions, erecting stacks, furnishing boilers, engines, generators, pole lines, lamps and other equipment for a municipal lighting plant for the Village of Orrville, in accordance with certain plans and specifications theretofore duly prepared for said village, which said plans and specifications were on file in the office of the board of trustees of public affairs of said village, and in the office of Frank Rae, Consulting Engineer, [fol. 204] 318 Engineers Building, Cleveland, Ohio; that said advertisement, among other things required that the bids and proposals must state the full name of every person or company interested in it, and should be accompanied by a certified check on a solvent bank for a sum not less than 5% of the total amount of the bid, for labor, machinery, material or apparatus, as a guarantee that if the bid was accepted, a contract would be entered into and performance

of the same properly secured. Said advertisement further required that if both labor and material were bid for, they should be separately stated, and the price thereof separately stated.

Plaintiff further says that said plans and specifications upon which bids and proposals were asked, in pursuance of said advertisement, among other things called for, one horizontal engine, Corliss, nonreleasing valve type, erected ready for operation.

Plaintiff further says that in conformity to said notice and advertisement, it submitted a bid and proposal for furnishing the engine last referred to and erecting the same at said lighting plant, for the sum of twenty-five hundred eighty (\$2,580) dollars; and said bid was the lowest and best bid; that on the thirtieth day of January, A. D. 1914, said board of trustees of public affairs of said village duly accepted plaintiff's said bid, and thereafter, to wit, on or about the fifteenth day of February, A. D. 1914 said board of trustees of public affairs of the Village of Orrville, on behalf of said village, duly entered into a written contract with this plaintiff for said engine, a copy of which said written contract is hereto attached and marked, "Exhibit A"; that by the terms of said written contract plaintiff agreed to furnish to said village one 13 x 20 non-releasing gear ball engine, together with all appliances, and to erect the same, for the sum of twenty-five hundred eighty (\$2,580) dollars; that by the terms of said written agreement it was [fol. 205] further provided, that if a certain side track which said village was about to cause to be constructed to its said lighting plant, was not ready for use at the time said engine was ready to be delivered at said plant in Orrville, the plaintiff was to be allowed the reasonable cost of hauling said engine from the car to said plant in the Village of Orrville, not exceeding one hundred fifty (\$150) dollars; that said Village of Orrville agreed to pay, in consideration for said engine, and the performance of said contract on the part of the plaintiff, as follows; 50% of the contract price upon receipt of the invoice by the Village of Orrville 25% of the contract price upon the erection of the engine at the plant; 20% of the contract price upon the completion of the test of said engine by the engineer in charge of work, and the filing of his written acceptance of

said engine with the Village of Orrville, and the balance of said contract price sixty days after test and acceptance.

Plaintiff further says that before said written contract and agreement was entered into, to wit, on the tenth day of February, A. D. 1914, the clerk of said Village of Orrville duly certified to the council and to the board of trustees of public affairs of said village, that the money required for said contract and agreement was in the treasury to the credit of the electric light fund, which was the fund from which the consideration for said contract was to be paid, and was not appropriated for any other purpose.

Plaintiff further says it duly executed and delivered to the defendant a good and sufficient bond to the acceptance of the defendant agreeably to the third paragraph of the article of agreement marked Exhibit "A."

Plaintiff further says that it has duly performed all and singular the terms and conditions of said written contract on its part to be performed; that it has duly delivered, installed and erected said engine, and the same has been [fol. 206] tested by the engineer of said village, and the written acceptance by said engineer has been filed with said Village, and more than sixty days has elapsed since said test and acceptance.

Plaintiff further says that said side track was not completed at the time said engine was ready for delivery, and the same could not be delivered to said plant on said side track; that plaintiff incurred a reasonable expense in the sum of \$150 for hauling charges in conveying said engine from the car to said plant.

Plaintiff further says that said village has paid upon said contract the sum of twelve hundred ninety (\$1,290) dollars, and no more; that there is due the plaintiff from the defendant the balance of fourteen hundred forty (\$1,440) dollars with interest from the first day of September A. D. 1914.

Wherefore, plaintiff claims judgment against the defendant in the sum of fourteen hundred forty (\$1,440) dollars with interest from the first day of September, A. D. 1914.

Rogers, Mather & Nesbit and Taggart, Weygandt & Ross, Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT "A" TO PETITION

Article of Agreement

This article of agreement entered into by and between the Village of Orrville, in Wayne county, Ohio, by its duly elected, qualified and acting board of trustees of public affairs, hereinafter designated as the first party, and the Dravo-Doyle Company, of Pittsburgh, Pa. hereinafter [fol. 207] designated as the second party, witnesseth:

Whereas, the said first party on the twenty-eight day of January, A. D. 1914, received a proposal from said second party for the furnishing and erecting of a certain Ball engine and other appliances, as are set forth in and in accordance with specifications, a copy of which forms a part of this contract, which said proposal was on the thirtieth day of January, A. D. 1914, declared by said first party to be the lowest and best proposal, and was on the date last mentioned above accepted as such, now,

Therefore, It is agreed by and between the said first party and the said second party as follows:

First. That for and in consideration of the payments and covenants hereinafter mentioned, said second party agrees to furnish and erect, in accordance with the specifications hereto attached, which said specifications are hereby incorporated in, and made a part of, this contract, and are marked Addenda "A" and the specifications, guarantees, statements and proposals, not in conflict with this contract and the specifications, forming a part thereof, contained in said second party's proposal as submitted and accepted, one (1) 13 x 20 non-releasing gear ball engine, together with any and all other appliances, etc. as set forth in the specifications.

Second. The said second party also agrees and promises to furnish the said ball engine and erect the same at such place or places as are indicated on the plans and in accordance with the specifications within a period of — days from and after the signing of this contract.

[fol. 208] Third. The said second party also agrees and promises to execute and deliver to the said first party a good and sufficient bond, to the satisfaction of the first

party, in the sum of fourteen hundred dollars (\$1,400), conditioned on the full and faithful performance of this contract; the saving harmless of the first party, its officers, boards and agents, collectively and individually, from any and all suits for damages, royalties or other causes of action, arising out of or due in any manner to the failure, neglect or other wrongful act of the said second party, its agents or employees; and the repairing and making good of all damages due to inherent defect in material or from poor workmanship, either in construction or erection, in said engine, for and during a period of one (1) year from and after delivery thereof.

Fourth. The said first party agrees to pay to the second party, upon the full and faithful performance of this contract, and the said second party agrees to accept, as payment in full for the furnishing and erecting of said Ball engine, etc. under the terms and provisions of this contract, the sum of twenty-five hundred and eighty dollars (\$2,580) at the times and in the amounts as follows:

(a) Fifty (50) per centum of the contract price upon receipt of the bill of lading by the first party.

(b) Twenty-five (25) per centum of the contract price upon erection of engine, etc. at the plant in accordance to the plans and specifications.

(c) Twenty (20) per centum of the contract price upon completion of test by the engineer and the filing of his written acceptance of the said engine, etc., with the first party.

(d) Five (5) per centum of the contract price sixty (60) days after test and acceptance.

(e) In case the test by the engineer is not made within thirty (30) days after machinery is erected, then and in that case the final twenty-five per centum of the contract price [fol. 209] becomes due and payable thirty (30) days after completion of erection.

In testimony whereof, The said first party and the said second party have caused their respective names to be affixed to this article of agreement, which is executed in

duplicate, and the same to be subscribed by its proper officers, this — day of February, A. D. 1914.

Village of Orrville, Ohio, by J. W. Kropf, by F. W. Kinney, by H. D. Wyre, Board of Public Affairs.
Witness:- E. C. Williamson, W. R. Cook. Dravo-Doyle Company, by Thos. E. Doyle, President.
Witness: Frank S. McClintock.

It is mutually understood and agreed by and between the said first party and said second party that in case the side track at the light plant is not ready for use at the time the engine sold by said second party to said first party is ready to be delivered at the plant in Orrville, Ohio, then and in that case haulage charges, not to exceed one hundred and fifty dollars (\$150), shall be added to the contract price of the machinery mentioned in this contract.

[fol. 210] The above contract is altered according to the provisions of this rider, which is attached to and made a part of this contract, and the same is hereby ratified by the parties to this agreement this — day of March, 1914.

Board of Public Affairs, by J. W. Kropf, President.
Dravo-Doyle Co., by Thos. E. Doyle, President.

It is mutually understood and agreed by and between the said first party and said second party that subdivision (a) of section (4) of this agreement be altered and changed to read as follows:

(a) Fifty (50) per centum of the contract price upon receipt of invoice by the first party.

The above contract is altered according to the provisions of this said rider, which is attached to and made a part of this said contract, and this said rider and the provisions contained therein are hereby ratified and adopted by the parties of this agreement this twenty-fifth day of May, A. D. 1914.

(Signed) Village of Orrville, Ohio, by J. W. Kropf,
by F. W. Kinney, by H. D. Wyre, Board of Public
Affairs, per Thos. E. Doyle, President.

May 26, 1914.

[fol. 211]

Waiver

The defendant, the Village of Orrville, hereby waives the issuing and service of summons and voluntarily enters its appearance herein.

Clyde Merchant and G. A. Starn, Attorneys for Defendant.

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

ANSWER—Filed January 14, 1915

Now comes the defendant and for its answer to plaintiff's petition says that it admits that the plaintiff is, and for the period of two years last past has been, a corporation as alleged in the petition; admits that the defendant is a municipal corporation as alleged in the petition; admits that the defendant is, and during the past two years has been, a village in which there is situated a municipal water works owned and operated by said Village and supplying water to it and the inhabitants thereof; admits that there is, and for the period of two years and longer last past has been in existence in said village a board of trustees of public affairs consisting of three members residents of said village which said board of trustees of public affairs is and has been performing and exercising the powers and duties delegated to said board by the laws of the State of Ohio, and denies each and every other allegation contained in said petition, except such as are hereinafter admitted to be true.

Further answering this defendant says that on July 21, 1913, this defendant by its counsel passed a resolution declaring it necessary to issue bonds of said village in the sum of \$41,000 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances necessary or desirable for the operation of an electric lighting, heating and power plant in said village; that on [fol. 212] the twenty-sixth day of August, 1913 under authority of said resolution and in accordance therewith it published notice of election, and an election was held in said village upon the question of the issuance of said bonds for said purpose, and that said question was, at said election

carried by an affirmative vote of said village; that on the seventeenth day of November 1913, defendant, by its council, passed an ordinance providing for the issuance of said bonds for the purposes and in the amount set forth in said resolution of July 21, 1913; that in pursuance of said ordinance and after advertisement therefor, on the twenty-fourth day of December, 1913, bids were received for the sale of said bonds and the same were sold to the Mellon National Bank of Pittsburgh, Pa., and said bonds were issued and delivered and the money therefor received by this defendant on February 3, 1914; that beginning January 12, 1914, defendant advertised for bids for the building of an addition to the water works station building, and for the construction of a stack and for furnishing boilers, machinery, generators, poles, lines, lamps, etc., for a municipal electric lighting plant for defendant in accordance with certain specification theretofore adopted by the defendant, and in accordance thereto on the twenty-eight-day of January, 1914, received bids for the furnishing of said material and for the construction of said material and for the construction of said electric light plant; that among the bids received was the bid of plaintiff for the furnishing of one 250 K. V. A. generator and one 18 x 36 releasing gear Corliss engine, erected and ready for operation, which bids of plaintiff's was by defendant accepted and a contract attempted to be entered into therewith. A copy of said contract is attached to the plaintiff's petition.

[fol. 213] Further answering defendant says that afterwards, to wit, on the twelfth day of March, 1914, the Massillon Electric & Gas Company filed its petition and thereby commenced an action in the Court of Common Pleas of Wayne County, Ohio, against this defendant and others, being cause No. 24440, wherein it was alleged that said the Massillon Electric & Gas Company is a corporation organized under the laws of the State of Ohio, and engaged in business in the Village of Orrville. It further alleged in said petition that it owns and operates, and at all times mentioned in said petition owned, operated and maintained, in said Village of Orrville an electric works and plant theretofore erected in said village under an existing franchise duly granted by said village. It further alleged that at the time of the filing of said petition it was supplying and had

been supplying electricity from said light plant for lighting and power purposes in said village, including municipal and private lighting, and that it had complied with the terms, conditions and requirements of its said franchise. Said the Massillon Electric & Gas Company in its petition further alleged that neither said village nor its council mayor, Board of Public Affairs or any authorized agent or officer thereof had ever offered or made any effort to purchase from it the said electric lighting and power plant and works owned by it, and located in said village as is required by the laws of the State of Ohio, and especially by the provisions of Section 3990 of the General Code of Ohio. Said the Massillon Electric & Gas Company, in its said petition asked that a temporary injunction be granted by the court against this defendant restraining it from entering into a contract or contracts for the erection of an electric lighting and power plant for said Village of Orrville, and restraining it from entering into any contract for erecting any [fol. 214] buildings or additions to buildings, or for the purchase of property, real or personal, stacks, boilers, machinery, generators, poles, lamps equipment or appliances whatsoever for the purpose of erecting or completing such an electric light plant, and restraining said defendant from erecting or performing any acts toward the erection of such an electric light plant, and restraining it from the execution or performance of any contract for such purpose, and restraining it from expending or authorizing the expenditure of any sums of money whatsoever for the purpose of carrying out or fulfilling any such contracts, and that upon the final hearing of said cause that said temporary restraining order be made permanent in all respects.

Further answering this defendant says that upon the filing of said petition by the Massillon Electric & Gas Co. a temporary restraining order was by the court granted as prayed for in said petition; that upon the final hearing of said cause said temporary restraining order was by the court dissolved and said petition dismissed, and that thereupon an appeal was perfected to the Court of Appeals of Wayne county, Ohio, by said the Massillon Electric & Gas Company, which was cause No. 637 in said Court of Appeals; that upon the hearing of said cause in said Court of

Appeals said temporary restraining order was by the consideration of the court made permanent in all respects, and it was by said Court of Appeals adjudged and decreed that this defendant the Village of Orrville, be enjoined from doing all and several the things prayed for by said the Massillon Electric & Gas Company in its petition in said actions. A copy of the judgment and order of said Court of Appeals as entered of record is hereto attached, marked "Exhibit A" and made a part hereof. A copy of the court's opinion in said cause is hereto attached marked "Exhibit B."

[fol. 215] Further answering this defendant says that thereafter, to wit, on the — day of March, 1914, the Massillon Electric & Gas Company, as a taxpayer, on behalf of and for the use of the Village of Orrville, filed its petition in the Court of Common Pleas, Wayne county Ohio against this defendant and others and thereby commenced an action in said court being cause No. 24458, wherein the said The Massillon Electric & Gas Company alleged that it is a corporation organized under the laws of Ohio and engaged in business in the Village of Orrville; that it is a taxpayer in said village of Orrville and brings its action as such taxpayer on behalf of and for the use of said village on account of the refusal of the village solicitor to bring the same. It further alleged that it owns and operates and that at all times mentioned owned operated and maintained in said village an electric works and plant theretofore erected in said village under an existing franchise duly granted by the village council, and that it was at the time of filing said petition, and at all times mentioned in said petition, engaged in supplying from said plant electricity for lighting and power purposes in said village, both public and private. It further alleged in its said petition the enactment and passage of the resolution and ordinances heretofore mentioned in this answer, and among other things alleged that the publication of the notice of election and notice of the sale of bonds was commenced before the expiration of ten days after passage of said resolution and ordinances, respectively, heretofore mentioned as passed by council of the Village of Orrville. It further alleged in substance that because of the manner in which said resolution

and ordinances was passed and the publication of notices required thereunder that the same were null and void and that the Village of Orrville, this defendant, in letting the contract to plaintiff herein, as well as the other contracts entered unto by this defendant with various parties acted without authority and said contracts were null and void. It further alleged that said 41,000 bond issue was not offered to the State Liability Board of Awards before advertised for sale.

[fol. 216] In said petition said the Massillon Electric & Gas Company asked that a temporary injunction be granted against this defendant, restraining it from entering into any contract for the erection of an electric light and power plant for said Village of Orrville and restraining it from entering into any contract for the purchase of any property or equipment for the purpose of such erection, and restraining it from issuing or selling bonds in the aggregate sum of \$13,500, and restraining it from expending any portion or all of the proceeds of the sale of the bonds of said village in the aggregate sum of \$41,000, and restraining it from levying a tax upon the property in said Village of Orrville for the purpose of paying interest on said bonds so sold or from in fact, paying any interest thereon, and from levying a tax to provide a sinking fund to pay any part of said issue of \$41,000 of bonds issued and sold, and restraining it from proceeding with the performance of any contract already awarded for the construction of said electric light plant, and that upon the final hearing of said cause that said temporary restraining order be made permanent.

That upon the filing of said petition a temporary restraining order was granted by said court restraining this defendant as prayed for in said petition; that upon the final hearing of said cause in said Court of Common Pleas said temporary restraining order was by order of the court dissolved and said petition dismissed and thereupon said the Massillon Electric & Gas Company perfected an appeal to the Court of Appeals of Wayne county, Ohio, being cause No. 638 in said court, and thereby said temporary restraining order was reinstated and was in full force and effect; that upon the final hearing of said cause in said Court of Appeals said temporary restraining order was by

the consideration of said Court of Appeals made permanent in all respects and it was by said Court of Appeals adjudged and decreed that this defendant, the Village of Orrville, be permanently restrained from doing and performing [fol. 217] all and singular the acts and things as prayed for by said The Massillon Electric & Gas Company in its said petition. A copy of the judgment and order of said Court of Appeals as entered upon the records of said Court is hereto attached, marked "Exhibit C" and made a part hereof. A copy of the opinion of said Court of Appeals in said cause is hereto attached Marked "Exhibit D."

Further answering this defendant says that said judgment, order and decree of said Court of Appeals in said cause No. 637 and said judgment order and decree in cause No. 638 is still in full force and effect.

That plaintiff was by this defendant notified of the filing of said petition, the contents thereof and the granting of said temporary restraining order before it delivered any material to defendant, and had knowledge of all subsequent proceedings of said cases.

Further answering this defendant says that on the twenty-first day of July, 1913, the Massillon Electric & Gas Company did in fact own and was operating an electric light plant in said Village of Orrville under a franchise duly granted to it, and that said franchise had not then expired and that said the Massillon Electric & Gas Company was then supplying from said plant electricity to the village of Orrville and the inhabitants thereof for lighting and power purposes, both public and private; that no effort to purchase from the said the Massillon Electric & Gas Company its said plant was made by the Village of Orrville or any of its officers on or at any time prior to the seventeenth day of November, 1912; that by reason thereof and because of the provisions of Section 3990 of the General Code of Ohio, this defendant, the Village of Orrville was without power or authority to construct a municipal electric lighting plant. That said \$41,000 bond issue was advertised for sale without having been offered to the State Liability Board of Awards.

Further answering this defendant says that said resolution passed by the Village of Orrville on said twenty-first day of July, 1912, and said ordinance passed by said Vil-

[fol. 218] lage of Orrville on the seventeenth day of November, 1912, providing for the issuance of bonds were published in but one paper, to wit, The Orrville Courier-Crescent, and no further notice or publication of the passage of said resolution or said ordinance was given; that no notice of the passage of said resolution and said ordinance was given as required by law and therefore the same did not become affective, and this defendant, the Village of Orrville, acquired no jurisdiction to proceed further with the construction of its proposed municipal electric lighting plant.

By reason of all of which and the premises this defendant, the Village of Orrville, proceeded without authority in law, and said contract set forth in plaintiff's petition is null and void, and this defendant is without power or authority to comply with the terms thereof.

Wherefore defendant prays that plaintiff's petition may be dismissed and for such other and further relief as it may be entitled to.

Clyde Merchant and G. A. Starn, Attorneys for Defendant.

(Duly Verified.)

[fol. 219] "EXHIBIT A" TO ANSWER

THE STATE OF OHIO,
Wayne County, ss:

IN THE COURT OF APPEALS

No. 637

THE MASSILLON ELECTRIC & GAS COMPANY, Plaintiff,

VS.

THE VILLAGE OF ORRVILLE et al., Defendant

This twenty-fifth day of September, 1914, this cause came on for hearing on the pleadings, the evidence and the arguments of counsel and was submitted to the Court; on consideration whereof the court do find, on the issues joined, for the plaintiff and that the plaintiff is entitled to the relief prayed for.

It is therefore, on motion of the plaintiff, adjudged and decreed that the preliminary injunction heretofore granted in this action be, and the same hereby is made perpetual.

It is further considered that the said plaintiff recover from the said defendants respectively its costs herein expended, taxed at \$—. It is further ordered that any motion for a new trial herein, if filed by any defendant herein will be overruled. And this cause is remanded to Court of Common Pleas for execution. To all of which finding judgment and order the said defendants except.

Endorsed: "Approved." R. S. Shields, L. K. Powell, Judges Court of Appeals.

EXHIBIT- B AND D TO ANSWER

Opinion

By the COURT:

These two cases are in this court by appeal from the judges of the Court of Common Pleas. The plaintiff in each case being the appellant.

In case No. 637, the plaintiff filed its petition alleging that it was the owner of an electric light plant in the Village of Orrville, this county, and that the defendant, the Village of Orrville, by its duly elected officers, was about to erect a [fol. 220] municipal light plant in said village; that certain preliminary legislation had been had by the council of said village authorizing the issuance and sale of bonds and otherwise preparing to construct and operate an electric light plant in said village. A temporary injunction was allowed in the Court of Common Pleas where the cases were heard upon their merits resulting in a dismissal of the petition in each case.

The judgment of this court, which is in favor of the plaintiff in each of said actions, is based upon two distinct grounds: First, that the provision- of Section 3990 G. C., are in full force and effect, not having been repealed by the adoption of the amendments to the constitution, and that the provisions of this section providing for the sale of an electric light plant in villages to the municipality have not

been complied with. And, second, that the facts upon which the said Village of Orrville would have the right to exercise the jurisdiction claimed do not appear by the record.

It is contended on the part of the defendants that the provisions of Section 3990 of the G. C. which require that councils of a municipality intending to erect a municipal electric light plant at the expense of the corporation, or purchase any electric light works already erected by any person, company or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, "the Council shall, with the consent of the owner or owners, purchase such gas works of electric works already erected therein," "and that if the council and owner or owners of said electric works cannot agree upon the compensation to be paid therefor the council may file in the Probate Court of the county where said electric works are located, a petition to appropriate such gas works or electric works and thereupon the same proceedings shall be had of appropriation as is provided for the appropriation of private property by a municipal corporation, were repealed by the adoption of the recent amendment to the constitution."

[fol. 221] The petition in case No. 638 contains the necessary averment, that the plaintiff is the owner of said electric light works in the Village of Orrville under a franchise granted by said Village. No defense is made that the franchise has terminated. But it is claimed that the provisions of Section 3990, above quoted, are in conflict with the provisions of the amended constitution relating to municipalities, and especially in conflict with Section 5, Article 18 of the constitution as amended.

We are of the opinion that there is no conflict between Section 5 of Article 18, nor with any other section of said Article 18, and the said Section 3990; that this section of the statutes is in full force and effect; and that the defendant, the Village of Orrville, having failed to either purchase or condemn the property of the plaintiff, its action is without authority of law and the injunction allowed should be made perpetual.

The second ground upon which the court is authorized to render judgment for plaintiff is, that the ordinances of

the Village of Orrville providing for the issuing of bonds and the sale of the same, were not passed as required by law. We think that these ordinances are ordinances of a general nature and provide for public improvement and that therefore they come within the provisions of Section 4227, which provides, among other things: "Ordinances of a general nature or providing for improvements shall be published as hereinafter provided before going into operation. We think this provision is jurisdictional. That when [fol. 222] the council fails to pass such ordinances in the manner prescribed by the statutes it is without jurisdiction to proceed further with the matter in hand, in this case, the erection of an electric light plant for the Village of Orrville. It is provided by Section 4228:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be."

And it is further provided by Section 4229:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two papers of opposite politics, of general circulation therein, if there are such in the municipality."

It will be noticed that these provisions are mandatory. Therefore they must be strictly complied with in order to give the council jurisdiction to proceed in the construction of an electric light plant.

It appears by the record that the ordinances of said village and resolutions when published were published in but one newspaper, The Orrville Courier Crescent, and not in two newspapers as required by these statutes. It does not appear what the politics of the Orrville Courier Crescent is, whether Democrat, Republican or of some other political affiliation.

It is a well settled rule in Ohio that inferior tribunals comply strictly with the statutes giving jurisdiction until

such jurisdiction has been acquired. Perhaps there are many things that may be done after jurisdiction attaches that are not in strict compliance with statutory provisions, but every statutory provision that relates to jurisdiction or the right of the corporation to act must be strictly con-[fol. 223] formed to. There are but two methods of publication of ordinances of a general nature and providing for improvements mentioned and provided for in the statutes. They are, first by the provisions of Section 4229, by publication in two newspapers of opposite politics of general circulation in said municipality if there are such, and if there are none such, and no newspaper published in said municipality the notice may be given by posting copies thereof at not less than five of the most public places in the corporation for a period of not less than 15 days.

It may be contended that because this provision only applies to municipalities where no newspaper is published that by implication publication could be had in one newspaper where such paper was published in the municipality. We do not think that where the matter is jurisdictional anything of the kind can be implied, and that no other publication than one of the two methods mentioned is a compliance with the requirement of the statute.

This has been held by other courts in the state and was held by this court to be the law in an action before it for the improvement of a public street in one of the Villages of Muskingum county, Ohio.

For the two reasons mentioned the judgment will be rendered in favor of the plaintiff in each of said cases, Nos. 637 and 638. In case No. 638 the action was by the same plaintiff as a tax payer in which it seeks to enjoin the expenditure of the moneys raised by the sale of bonds for the purpose of constructing an electric light plant in said village. This action is authorized by law to be brought by a taxpayer in certain cases. The averment of this petition bring the action within the statutory provision permitting such actions to be so brought. We think the testimony sustains the averment of the petition in this action and that the defendant should be enjoined from proceeding with the erection of such plant. It should be sustained on [fol. 224] account of the invalidity of the proceedings of the council, both in the passage and the publication of the

ordinances set out and described in the petition, and because the provisions of the statutes relating to the construction of such improvements had not been complied with.

If motions for a new trial are filed in either or both of said cases they will be overruled.

Exceptions may be noted, and each of said cases will be remanded to the Court of Common Pleas for execution.

EXHIBIT C TO ANSWER

This twenty-fifth day of September, 1914, this cause came on for hearing on the pleadings, the evidence and the arguments of counsel, and was submitted to the court; on consideration whereof the court do find, on the issues joined, for the plaintiff and that the plaintiff is entitled to the relief prayed for.

It is therefore, on motion of the plaintiff, adjudged and decreed that the preliminary injunction heretofore granted in this action be, and the same hereby is, made perpetual.

It is further considered that the said plaintiff recover from the said defendants respectively its cost herein expended, taxed at \$—. It is further offered that any defendant herein will be overruled.

And this cause is remanded to Court of Common Pleas for execution. To all of which finding, judgment and order the said defendants except.

Endorsed: "Approved. R. S. Shields, L. K. Powell, Judges Court of Appeals.

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

REPLY—Filed January 18, 1915

And now comes the plaintiff herein and for reply to the answer of defendant, the Village of Orrville, says that on or about the thirteenth day of January, the board of trustees of public affairs duly advertised for bids for furnishing the machinery and material set out in plaintiff's petition. That thereupon this plaintiff upon inquiry as-

certained that the money required for the said contract was in the treasury of the said village to the credit of the electric light fund, and was not appropriated for any other purpose. And it thereupon duly made its bid, which was duly accepted and the said contract set out in plaintiff's petition was duly executed. And this plaintiff had no knowledge of any of the proceedings of said council prior to the said advertisement of said bids. And for want of such knowledge of any of the proceedings of said council prior to Village of Orrville to construct said electric light plant, or that any of the proceedings antecedent to the advertisement of said bids were illegal or void. This plaintiff further says that it was not a part to said proceedings in the Court of Common Pleas, or in the Court of Appeals and was in no wise affected by said judgments. This plaintiff denies that it had any knowledge or notice of the pendency of said suits, or the judgment therein prior to the execution of [fol. 226] said contract and the giving bond for the execution thereof. And this plaintiff denies that the Village of Orrville was not authorized to construct said electric light plant, or that the proceedings for the construction of said municipal and said electric light plant were illegal and void.

This plaintiff further says that said Section 3990 of the General Code of Ohio is unconstitutional and void because the same is in conflict with Article 18 of the Constitution of the State of Ohio, and for the further reason that the same was repealed and annulled by the general schedule attached to the amendments to the Constitution adopted September 1912.

Wherefore, having fully answered, it prays judgment as in its petition.

Rogers, Mather & Nesbitt and Taggart, Weygandt
& Ross, Attorneys for Plaintiff.

(Duly verified.)

IN COURT OF COMMON PLEAS OF WAYNE COUNTY

MOTION FOR NEW TRIAL—Filed January 19, 1915

And now comes the plaintiff herein and moves the court to set aside the finding and judgment of the court heretofore made herein, and grant a new trial herein for the following reasons, to wit:

First. Said judgment and finding is contrary to agreed statements of fact filed herein.

Second. Said judgment is contrary to law.

Third. Said finding and judgment is not sustained by sufficient evidence and is contrary to law.

Fourth. Said judgment was given for said defendant when it should have been given for said plaintiff.

Other errors apparent on the record to which the plaintiff excepted at the time.

Rogers, Mather & Nesbitt and Taggart, Weygandt & Ross, Attorneys for Plaintiff.

[fol. 227] IN COURT OF COMMON PLEAS OF WAYNE COUNTY

Bill of Exceptions—Filed January 19, 1915

CAPTION

Be it remembered that at the trial of the above entitled cause on the nineteenth day of January, 1915, being a day in the October Term, 1914, of the Court of Common Pleas within and for said county of Wayne, before the Honorable L. R. Critchfield Jr., judge presiding, a jury being waived by the parties, the following agreed statement of facts was submitted by the parties hereto as maintaining the issues involved herein and being all the testimony introduced in said cause.

AGREED STATEMENT OF FACTS

It is hereby agreed by and between plaintiff and defendant that a jury be waived in this case, and that the same be submitted to the court for a decision upon the following agreed statement of facts so far as the same are material and competent.

1. That on July 21, 1913 the defendant, by its council passed a resolution declaring it necessary to issue bonds of the Village of Orrville in the sum of \$41,000 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances necessary or desirable for the operation of an electric lighting, heating and power plant in said village, that said resolution, among other things, provided that the question of issuing bonds in the sum of \$41,000 be submitted to the voters of said village [fol. 228] on the twenty-sixth day of August 1913; that said resolution was published in the Orrville Courier-Crescent for two consecutive weeks, the first publication being on July 25, 1913. No other notice of the passage of said resolution was given; that in accordance with said resolution a notice of said election was published in the Orrville Courier-Crescent once a week for four consecutive weeks, the first publication being July 25, 1913; that on the twenty-sixth day of August, 1913 an election was held in said village on said question of the issuance of \$41,000 of bonds, and that said proposition carried by an affirmative vote of more than two-thirds of the votes cast at said election, the affirmative vote being 624 and the negative vote being 59. That the total vote cast for governor in said village in 1912 was —.

2. That on the seventeenth day of November 1913, this defendant by its council passed an ordinance providing for the issuance of said bonds for the purpose and in the amount set forth in said bonds resolution of July 21, 1913; that said ordinance was published in the Orrville Courier-Crescent for two consecutive weeks, the first publication being on November 21, 1913 and no other notice of the passage of said ordinance was given; that in pursuance of the provisions of said ordinance notice of the sale of said \$41,000 bonds issue was given by publication in the Orrville Courier-Crescent, and in the Wooster Daily Republican,

by publication for four consecutive weeks, the first publication being on November 21, 1913; that on December 24, 1913 bids were received for the sale of said bonds and the same were awarded to the Mellon National Bank of Pittsburgh, Pa., at a premium of \$795, and on the third day of February, 1914 said bonds were delivered to said bank and the money there for received by the village of Orrville.

3. That the Board of Trustees of Public Affairs duly advertised for bids and proposals for the furnishing of machinery and material for the construction of said electric lighting plant in the Orrville Courier-Crescent for two consecutive weeks, the first publication being on January 13, 1914 and that plaintiff submitted a bid to furnish one Horizontal Engine, Corless Non-releasing Type erected ready for operation, which bid of the plaintiff was by the defendant accepted, and on the fifteenth day of February, 1914, a contract was entered into between said board of trustees of trustees of public affairs and the plaintiff, and that the copy attached to plaintiff's petition marked "Exhibit A" is a true copy of said contract that the defendant as agreed by the terms of said contract, was to pay plaintiff the sum of \$2,580; that plaintiff executed and delivered to defendant a good and sufficient bond to the acceptance of the defendant as required by said contract.

4. That in accordance with said contract plaintiff delivered to the defendant, the Village of Orrville, on the twentieth day of July, 1914, machinery and material mentioned in said contract and performed all of the other obligations on its part to be performed by said contract; that there is due the plaintiff from the defendant the sum of \$1,313.34 upon its said contract, which the defendant is ready and willing to pay but for the fact that it is restraining order and injunction mentioned in the answer and hereafter in these findings of fact.

5. That on July 21, 1913, and prior thereto, and at all times since said date The Massillon Electric & Gas Company, an Ohio corporation, owned an electric lighting plant in said Village of Orrville and was furnishing electricity to said village and the inhabitants thereof for both public and private lighting, under a franchise granted by said village in 1892, and that said franchise has not yet expired.

[fol. 230] 6. That on the sixth day of October, 1913, the mayor of the Village of Orrville was authorized by the council of said village, and did write a letter to the said The Massillon Electric & Gas Company, in which letter it was stated that by the votes of the people of Orrville at its special election it was shown that the people desired a municipal light plant and that said the Massillon Electric & Gas Company were asked in said letter to submit a plan or plans, whereby the village might take over the property of said light company. Other correspondence was had between the mayor of said village and said light company but none of the other correspondence other than said letter of October 6 was authorized by the council of said village; all of such subsequent correspondence was in regard to the same subject, and the result of the writing of the letter of October 6; that no other effort to purchase from the said The Massillon Electric & Gas Company its said plant was made by the Village of Orrville or any of its officers.

7. That on the twelfth day of March, 1914, The Massillon Electric & Gas Company filed its petition in the Court of Common Pleas of Wayne County, Ohio, against the defendant, the Village of Orrville, and others, being cause No. 24440, and on the third day of April, 1914, said The Massillon Electric & Gas Company as a taxpayer, on behalf of the Village of Orrville, commenced an action against this defendant and others, being cause No. 24458 in the Court of Common Pleas of Wayne County, Ohio, and it was alleged in said petition, among other things, such matters as are set forth in the defendant's answer herein, in regard thereto; that upon the filing of each of said petitions as aforesaid, a temporary restraining order was granted by the court restraining this defendant as alleged in its answer herein.

[fol. 231] That upon the final hearing of said actions in the Court of Common Pleas of Wayne County, to wit, May 21, 1914, said temporary restraining orders were dissolved and the petitions dismissed; that on the twenty-sixth day of May, 1914, said The Massillon Electric & Gas Company filed appeal bonds in each of said cases and thereby perfected an appeal to the Court of Appeals of each of said cases; that on the twenty-fifth day of September, 1914, upon

final hearing of said causes in the Court of Appeals said temporary restraining orders were made permanent in all respects as originally granted.

8. That on the twenty-sixth day of May, 1914, there was paid by the defendant to the plaintiff on their said contract the sum of \$1,290, and that no other payments have been made thereon; that plaintiff's expense incurred in hauling charges, for conveying said machinery and material from the car to said plant in Orrville was \$23.34.

9. That on the — day of March, 1914, the clerk of the Board of Public Affairs by letter notified plaintiff of the filing of the petitions of The Massillon Electric & Gas Company in the Court of Common Pleas of Wayne County and of the granting of the temporary restraining orders restraining this defendant from proceeding with the construction of its light plant.

10. That on the tenth day of February, 1914 the clerk of the Village of Orrville duly certified to the council and to the board of trustees of public affairs of said village that the money required for said contract between plaintiff and defendant was in the treasury to the credit of the electric light fund, and was not appropriated for any other purpose.

11. That the Judgment, order and decree of said Court of Appeals making said temporary restraining order permanent is still in full force and effect and no proceedings [fol. 232] have been instituted to reverse or vacate the same.

12. That there is but one newspaper published in the Village of Orrville, to wit, the Orrville Courier-Crescent, and that said paper is independent in politics.

13. That said \$41,000 bond issue was not offered to the State Liability Board of Awards prior to being adv. for sale, but that after the sale of said bonds the said St. Lia. Bd. of Aw. stated in writing that if said bonds had been offered to it that they would have been refused.

14. That the allegations contained in the petition which are admitted by the answer to be true, are also made a part of this agreed statement of facts.

15. That plaintiff was not a party in any manner to the suits brought in the Court of Common Pleas by The Massillon Electric & Gas Company, or in said case in the Court of Appeals of said county.

16. That on or before May 21 the plaintiff was notified by defendant that the temporary restraining order theretofore granted was dissolved and it was instructed to proceed with its contract.

Rogers, Mather & Nesbitt and Taggart, Weygandt & Ross, Attorneys for Plaintiff. Clyde Merchant and G. A. Starn, Attorneys for Defendant.

MINUTE ENTRIES

The foregoing agreed statement of facts was and is all the testimony and evidence offered by either party of the trial of this cause.

And the court having found for the defendant and against the plaintiff and entered a judgment as appears on record in this case.

Thereupon the plaintiff gave notice of filing a motion for new trial to be filed in this cause, and thereupon, within three days after the rendition of said judgment, the plaintiff [fol. 233] filed its motion for a new trial and to set aside the findings and judgment for the reason set forth in said motion.

That afterwards, to wit, on the nineteenth day of January, 1915, said motion of said defendant for a new trial was argued by counsel and submitted to the court which motion for a new trial by the plaintiff, the court upon consideration thereof on the nineteenth day of January, 1915, overruled, and to the findings of the court and the rendering of the judgment for the defendant and against the plaintiff and to the overruling of the court of the motion for a new trial, the plaintiff at the time then and there excepted, as appears on record in this cause. To all of which rulings, findings and judgments and the order of said court the plaintiff at the time then and there excepted and gave notice of its intention of filing a petition in error in this cause in the Court of Appeals of Wayne County, Ohio.

And thereupon said plaintiff, who at the time excepted to the rulings of said court, on the twentieth day of January, 1915, reduced its exceptions to writing and on the twentieth day of January, 1915, and within forty days of the date of the judgment of said court and the overruling of said motion for a new trial, filed the same with the clerk of the Court of Common Pleas of Wayne County, Ohio.

And thereupon the clerk of said court upon the filing of said bill of exceptions forthwith give notice to the adverse party or its attorneys and said adverse party within ten days after said notice filed objections or amendments thereto and said clerk thereupon transmitted said bill of exceptions, objections and amendments to the trial judge and said bill of exceptions, objections and amendments was on the twenty[fol. 234] tieth day of January, 1915, corrected, allowed and signed as a true bill of exceptions.

ORDER SETTLING BILL OF EXCEPTIONS

And thereupon on the twentieth day of January, 1915, said trial judge transmitted the same to the office of the clerk of said court and ordered the same to be filed and made a part of the record in this cause but not spread at length upon the journal.

L. R. Critchfield, Judge of the Court of Common Pleas and Trial Judge in this Cause.

Filed Supreme Court of Ohio September 30, 1924.

Filed Supreme Court of Ohio June 16, 1915.

[fol. 235] IN COURT OF APPEALS OF WAYNE COUNTY

EXHIBITS IN EVIDENCE

Vol. 1 of the Ordinance Record, Page- 32 to 36

An Ordinance Providing for Electric Lights, Heat, and Motive Power in the Village of Orrville, Wayne County, Ohio

Be it ordained by the Council of the Village of Orrville and it is hereby ordained:

Sec. 1. That Aurel P. Gans & Mellville D. Wilson, of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating Electric Light wire mains and apparatus complete for the distribution of Electricity for light, heat and power.

Sec. 2. Said Gans & Wilson in the construction of their plant or in conducting their wires for the distribution of Electric Current shall not unnecessarily intercept or obstruct the passage of any street, alley, lane or avenue or other thoroughfare in said Village, crossing same shall not unnecessarily mutilate, cut or trim any tree or trees except for the safe conduct of said electric wire and same shall be fully protected from any and all damages where such trimming is necessary to be done. Same shall erect said wires on poles not less than thirty feet long and placed in the ground at a sufficient depth to insure perfect safety.

Sec. 3. In consideration of the privileges hereby granted the said Gans & Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) Electric lamps of not less than 2000 candle power each, to be placed wherever the Council may direct in said Village of Orrville, said lamps to burn and be lighted and extinguished according to what is known as "The Moon-light Schedule", until 1 O'clock, and in addition then to be lighted whenever the moon is obscure and on rainy and stormy nights whenever same occurs outside the regular lighting hours.

[fol. 236] Sec. 4. In consideration of the construction of said Electric Light Plant as herein provided, the Council of said Village of Orrville hereby agrees and binds itself to take and use the light of said Gans & Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter annually for said lighting, a price equal to seventy-two (\$72) per year for each and every lamp of 2,000 candle power, said lamps

to be lighted and extinguished and kept in repair by and at the expense of said Gans & Wilson, Their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—Are light.

Sec. 5. Said Gans & Wilson shall commence work on said Electric Light Plant after the passage of this ordinance at such time as to have same completed by May 1, 1892, otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the Village annulled.

Sec. 6. The privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans & Wilson to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events of the want of necessary repairs to the machinery or apparatus of said Electric Light Plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction be made to the said Village of Orrville for any loss of lighting occasioned thereby.

Sec. 7. Said Gans & Wilson agree to accept this ordinance and to notify the co-neil in writing of such acceptance within ten days from the passage hereof, which acceptance together with the ordinance shall constitute a contract, otherwise the village shall be no longer bound thereby and said ordinance shall be void.

Sec. 8. All other ordinances heretofore passed pertaining to and providing for Electric Lights, Heat and Motive power by means of Electricity and all ordinances granting franchise for the erection and operation of Electric Wire Mains for the distribution of light, heat and motive power are hereby repealed.

[fol. 237] Passed and adopted Feb. 1, 1892.

M. R. Zell, Clerk. A. N. Brenneman, O. D. Braden,
J. W. Stansbury, Ordinance Committee.

Passed and adopted Feb. 1st 1892. (The same as printed and pasted on page 32.)

M. R. Zell, Clerk.

Vol. 2 of the Council Record, Page- 170 to 173

Minutes of Meeting Held Feb. 1st, 1892

Orrville, O., Feb. 1st, 1892.

Council called to order at 7 P. M.; Mayor Barrett presiding.

Members present: Stansbury, Braden, Robinson, Postwait, Brenneman.

Minutes of last meeting were read and approved.

The committee to whom was refer-ed the mater of lighting the corporation by an Electric Light Plant reported that they had visited Canal Dover, and had seen the Plant located there and had made the necessary inquiries of parties interested as to the quality of light furnished by said Plant who represented it as giving good satisfaction.

Moved & Sec. to accept said committee's report.

Electric Light Ordinance

An ordinance providing for Electric Lights, Heat and Motive Power in the Village of Orrville, Wayne County, Ohio, was presented by the ordinance committee.

Moved & Sec. that the above-named ordinance be accepted and passed to its 1st reading.

The Mayor ordered the vote called, resulting in Ayes: [fol. 238] Stansbury, Robinson, Braden, Postwait, Brenneman. Nays: None.

Moved & sec. that the rules be suspended from reading ordinance on three different days and that the ordinance just read be passed to its second reading.

They ordered the vote called, resulting in Ayes: Stansbury, Braden, Robinson, Postwaite, Brenneman. Nays: None.

The Mayor declared the motion carried.

That the rules be suspended from reading, moved & sec. ordinance on three different days, and that the ordinance just read be passed to its 3rd reading.

The Mayor ordered the vote to be called on said motion, resulting in ayes: Stansbury, Braden, Robinson, Postwait, Brenneman. Nays: None.

The Mayor declared the motion carried.

Moved and sec. that the ordinance just read be adopted as read.

The Mayor ordered the vote called on said motion, resulting in Ayes: Stansbury, Robinson, Braden, Postwait, Brenneman. Nays: None.

The motion was declared carried by the Mayor.

[fol. 239] Vol. 1 of the Ordinance Record Page 42

Ordinance for Repeal Sec. 5

Repeal of Section (5) five of ordinance providing for electric lights, heat, and motive power in the village of Orrville, Wayne County, Ohio, passed and adopted Feb. 1, 1892, to read as follows:

Section 5. Said Gans & Wilson shall commence work on said electric light plant after the passage of this ordinance, at such time as to have same completed by June 1, 1892; otherwise the ordinance will be null and void, the privilege and franchise hereby granted shall be declared forfeited and the obligations of the village annulled.

N. L. Royer, Mayor. H. S. Wertz, Clerk. J. W. Stansbury, O. D. Braden, D. G. Blackwood, Ordinance Committee.

(Same as printed and pasted on page 42.)

Vol. 2 of the Council Record, Page- 191 to 192

Minutes of Meeting Held Apr. 18th, 1892

Council met pursuant to adjournment at 7:30 P. M., Mayor Royer presiding.

Present: Stansbury, Braden, Bawman, Blackwood, Brenneman, Shunk.

Minutes of last meeting read & approved.

Com. on Ordinance

The following was presented by the ordinance committee, J. W. Stansbury, O. D. Braden & D. G. Blackwood:

Repeal of Section five of ordinance providing for Electric Lights, Heat & Motive power in the Village of Orr-

ville, Wayne County, Ohio, passed and adopted Feb. 1st, 1892, to read as follows:

Section 5. Said Gans & Wilson shall commence work on [fol. 240] said Electric Light Plant after the passage of the ordinance at such time as to have same completed by June 1st, 1892, otherwise the ordinance will be null & void, the privilege & Franchise hereby granted shall be declared forfeited & obligations of the village annulled.

It was moved & seconded that the ordinance just read be received & passed to its first reading.

Ayes & nays called, resulting in ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman & Shunk.

The Com. was instructed to read the ordinance.

Moved & sec. ordinance just read, rules be suspended.

Ayes: Stansbury, Braden, Bawman, Blackwood Brenneman & Shunk. Nays: None.

It was moved & seconded ordinance just read rules be suspended & passed to its third reading.

Ayes: Stansbury, Braden, Bowman, Blackwood Brenneman & Shunk. Nays: None.

The ordinance was read again.

It was moved & seconded ordinance be adopted as just read.

Ayes: Stansbury, Braden, Bawman, Blackwood, Brenneman & Shunk. Nays: None.

[fol. 241] Vol. 2 of the Council Record, Page- 191 and 192

Minutes of Meeting Held Apr. 18th, 1892

Council met pursuant to adjournment at 7:30, Mayor Royer presiding.

Present: Stansbury, Braden, Bawmon, Blackwood, Brenneman, Shunk.

Minutes of last meeting read and approved.

Com. on Ordinance.

The following was presented by the ordinance committee, J. W. Stansbury, O. D. Braden, D. G. Blackwood:

Ordinance

Repeal of Section five or ordinance providing for electric lights, heat, and motive power in the village of Orrville,

Wayne County, Ohio, passed and adopted Feb. 18th, 1892, to read as follows:

Sec. 5. Said Gans & Wilson shall commence work on said Electric Light Plant after the passage of this ordinance at such time as to have same completed by June 1st, 1892, otherwise the ordinance will be null & void, the privilege & franchise hereby granted shall be declared forfeited, & the obligations of the village annulled.

It was moved & seconded that the ordinance just read be received & passed to its first reading.

Ayes & nays called, resulting in ayes: Stansbury, Braden, Bowman, Blackwood, Brenneman & Shunk.

The Com. was instructed to read the ordinance.

Moved & seconded ordinance just read, rules be suspended.

Ayes: Stansbury, Braden, Bowman, Blackwood, Brenneman & Shank. Nays: None.

It was moved & seconded ordinance just read rules be suspended & passed to its third reading.

Ayes: Stansbury, Braden, Bowman, Blackwood, Brenneman & Shunk. Nays: None.

The ordinance was read again. It was moved and seconded ordinance be adopted as just read. Ayes: Stansbury, Braden, Bowman, Blackwood, Brenneman & Shunk. Nays: None.

[fol. 242] Vol. 1 of the Ordinance Record, Page- 225 to 229

Ordinance Providing for Lighting Streets & Alleys

Be it ordained by the Council of the Village of Orrville, Ohio, and it is hereby ordained:

Sec. 1. That in accordance with the proposition submitted to the Council of the Village of Orrville, Ohio, by the Orrville Light, Heat & Power Company, and in consideration the said Village of Orrville perform the conditions hereinafter set forth in this ordinance, in Sec. 2 thereof. The Orrville Light Heat & Power Company shall furnish the Village of Orrville for a period of five (5) years from the 15th day of July, 1902, on the several streets, lanes, alleys & avenues of said Village not less than thirty (30) Electric

lamps (Arc Lights) of not less than two thousand (2,000) candle power each and as many more of like power and quality additional as the council of said Village within the said period of five (5) years may from time to time direct, any such additional lamps to those now in use in said Village, to be placed wherever the council may direct within the limits of said Village, said lamps when so placed to continue in use until the end of said period of five (5) years from the date this ordinance goes into effect, and all of said lamps to burn and be lighted and extinguished according to what is known as the moon-light schedule until Eleven thirty (11:30 o'clock and in addition thereto to be lighted whenever the moon is obscure and on rainy and stormy nights whenever the same occurs outside the regular lighting hours, and said lamps shall be placed, lighted, extinguished and kept in repair by and at the expense of the said The Orrville Light Heat and Power Company.

Sec. 2. The Village of Orrville by its common council agrees in consideration of the faithful performance by the Orrville Light Heat & Power Company of the conditions set forth in section 1 of this ordinance to be by it performed to pay the said The Orrville Light Heat & Power Company a price equal to Fifty three (53.00) Dollars per year for a period of five (5) years from the date that this Ordinance shall go into effect the same to be paid monthly for each and every 2,000 candle power lamp (Arc-light) the total number of said lamps to be not less than thirty (30) for the full [fol. 243] period of five (5) years and as many more as the council may from time to time direct said company to place, the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

Sec. 3. The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said The Orrville Light Heat & Power Company to perform any of the conditions hereby imposed where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said Electric Light Plant provided such accidents be remedied and repairs made within a reasonable

time and a pro rata reduction be made to the said Village of Orrville for any loss of lighting occasioned thereby.

Sec. 4. Said the Orrville Light Heat & Power Company shall furnish light for full commercial lighting in said Village to the citizens thereof at a price not to exceed seven and one half cents per Kilowat- hour, meter rate.

Sec. 5. Said Orrville Light Heat & Power Company shall accept this ordinance and notify the council in writing of such acceptance within ten (10) days from the passage thereof which acceptance together with the ordinance shall constitute a contract otherwise the Village shall be no longer bound thereby and this ordinance shall be void.

Sec. 6. This ordinance shall take effect and be in force from and after its passage, acceptance and legal publication.

Passed June 16th, 1902.

C. F. Craft, Clerk. Wn. Faber, Mayor.

[fol. 244] Vol. 3 of the Council Record, Page 318

Minutes of Meeting Held June 16th, 1902

Council met in regular session in Council chamber, Mayor Faber in the chair.

Members present: Solicitor Orr, Councilmen Strauss, King, Tanner, Griffith and Ohl. Absent: Gillam.

Minutes of last meeting read and approved.

Petition signed by A. I. Yeakley, E. G. Cook, Geo. I. Peters, and 17 others, property owners on Walnut Street, asking the council to specify a width of 20 feet in the improvement of said street was read and by motion was accepted and placed on file.

Ayes: Strauss, King, Tanner and Griffith. Naves: None. Motion carried.

Ordinance providing for lighting the streets and alleys of Orrville, Ohio, and fixing the rates for commercial lighting read.

Moved and seconded that the light ordinance be passed to its first reading.

Ayes: Strauss, King, Tanner, Griffith & Ohl. Naves:
None. Motion carried.

Ordinance read.

Moved and seconded that the rules be suspended and the above ordinance be passed to its second reading.

Ayes: Strauss, King, Tanner, Griffith & Ohl. Naves:
None. Motion carried.

Ordinance read.

Moved and seconded that the rules be suspended and the above ordinance be passed to its third reading.

Ayes: Strauss, King, Tanner, Griffith & Ohl. Naves:
None. Motion carried.

Ordinance read.

Moved and seconded that the ordinance providing for the lighting of our streets & alleys just read be adopted as read.

Ayes: Strauss, King, Tanner, Griffith & Dhl.

Motion to adjourn carried.

C. F. Craft, Clerk. W. Faber.

[fol. 245] Vol. 3 of the Ordinance Record, Page- 122 to 126

An Ordinance Providing for Lighting the Streets and Alleys of the Village of Orrville, Ohio, and Fixing the Rates for Commercial Lighting

Be it ordained by the Council of the Village of Orrville, Ohio:

Section 1. That in accordance with the proposition submitted to the council of the Village of Orrville, Ohio, by The Orrville Light, Heat & Power Company and in consideration that the Village of Orrville perform the conditions hereinafter set forth in this ordinance in section 2 thereof, The Orrville Light, Heat & Power Company shall furnish the Village of Orrville for a period of five years from the 15th day of July, 1907, on the several streets, avenues and alleys of said Village, not less than thirty-two (32) new electric lamps (are lights) of not less than 2,000 candle power each, and as many more of like power and quality additional as the council of said village within the said period of five years, may from time to time direct,

any such additional lamps to those now in use in said village to be placed wherever the council may direct within the limits of said village, said lamps when so placed to continue in use until the end of said period of five years from the date this ordinance goes into effect, and all of said lamps to burn all night and each and every night in the year, and said lamps shall be placed, lighted, extinguished and kept in repair by and at the expense of the said The Orrville Light, Heat & Power Company.

The said The Orrville Light, Heat & Power Co. shall also place and keep in repair at their expense, in the streets of said village at places to be designated by the council not less than three red lights of the same candle power as those used at Wooster, Ohio, for the same purpose to be operated from the Telephone Exchange and used for police purposes, the same to be furnished free of any charge.

Section 2. The village of Orrville by its council agrees in consideration of the faithful performance by The Orrville Light, Heat & Power Co., of the conditions set forth in section 1 of this ordinance to be by it performed, to pay the said The Orrville Light, Heat & Power Co. for the said lights as follows: A price equal to Seventy dollars (\$70.00) per year for each and every 2,000 candle power lamp (arc [fol. 246] lights), if the total number of lamps does not exceed fifty; a price equal to Sixty-seven dollars (\$67.00) per year for each and every 2,000 candle power lamps (arc lights), if the total number exceeds fifty and does not exceed sixty; a price equal to Sixty-Four dollars (\$64.00) per year for each and every 2,000 candle power lamps (arc lights) if the total of lamps exceeds sixty and does not exceed seventy; a price of Fifty-nine dollars (\$59.00) per year for each and every 2,000 candle power lamp (arc lights) if the total number of lamps exceeds seventy and does not exceed eighty; a price equal to Fifty-four dollars (\$54.00) per year for each and every 2,000 candle power lamp (arc lights) if the total number of lamps exceeds eighty and does not exceed ninety; a price equal to Forty-nine dollars (\$49.00) per year for each and every 2,000 candle power lamp (arc lights) if the total number of lamps exceeds ninety, the same to be paid monthly and for a period of five years from the date this ordinance shall go

into effect, and the total number of said lamps to be not less than thirty-two (32) for the full period of five years and as many more as the council may from time to time direct said company to place, the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

Section 3. The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said The Orrville Light, Heat & Power Co. to perform any of the conditions hereby imposed, where such failures are occasioned by accident, untoward events or the want of necessary repairs to the machinery or apparatus of said Electric Light Plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction to be made to said village of Orrville for any loss of lighting occasioned thereby.

Section 4. Said The Orrville Light, Heat & Power Company shall furnish light for full commercial lighting in said village, to the citizens thereof, at a price not to exceed seven and one-half cents per kilowatt-hour, meter rate.

Section 5. Said the Orrville Light, Heat & Power Co. shall accept this ordinance and notify the council in writing of such acceptance within ten days from the passage thereof, which acceptance together with this ordinance shall constitute a contract, otherwise the village of Orrville shall be no longer bound thereby and this ordinance shall be void.

Section 6. This ordinance shall take effect and be in force from and after the 15th day of July, 1907, and after its acceptance and legal publication.

Passed November 19, 1906.

S. W. Jackson, Clerk. A. N. Brenneman, President
pro Tem.

(Same as printed and pasted on page 122.)

Vol. 4 of the Council Record, Page 245

Minutes of Meeting Held Nov. 19th, 1906

A. U. Brenneman, Chairman pro Tem., presiding.
All members present.

O. L., H. & Pr. Co. Ordinance

Moved by Kraft and supported by Leickheim that the ordinance providing for lighting the streets and alleys of the Village of Orrville, Ohio, and fixing the rates for commercial lighting for a period of five years from July 15th, 1907, be passed to its first reading.

Ayes: Leickheim, Yeakley, Kraft, Willaman, Eberhart, and Brenneman. Nays: None. Motion carried.

Moved by Willaman and supported by Kraft that the Light Ordinance be passed to its second reading.

Ayes: Leickheim, Yeakley, Kraft, Willaman, Eberhart, and Brenneman. Nays: None. Motion carried.

Moved by Leickheim and supported by Yeakley that the rules be suspended and the ordinance be passed to its third reading.

Ayes: Leickheim, Yeakley, Kraft, Willaman, Eberhart, and Brenneman. Nays: None. Motion carried.

Moved by Yeakley & supported by Eberhart that the ordinance *be* adopted as read.

Ayes: Leickheim, Yeakley, Kraft, Eberhart, Willaman, and Brenneman. Nays: None. Motion carried.

Clerk was instructed by Council to have Ordinance published in the Orrville Crescent.

Motion to adjourn.

S. W. Jackson, Clerk. G. A. Starn, Mayor.

[fol. 248] Vol. 4 of the Ordinance Record, Page- 273 to
276

An Ordinance Providing for Lighting the Streets and Alleys of the Village of Orrville, Ohio, and Fixing the Rates for Commercial Lighting

Be it ordained by the Council of the Village of Orrville, Ohio:

Section 1. That in accordance with the proposition submitted to the Council of the Village of Orrville,, Ohio, by D. I Rennekar and in consideration that the Village of Orrville perform the conditions hereinafter set forth in this ordinance, in section 2 thereof, D. I. Rennekar shall furnish the Village of Orrville, for a period of five years from the 15th day of July 1912 on the several streets, avenues and alleys of said village, not less than 32 electric lamps (arc lamps) of not less than 2,000 candle power each, and as many more of like power and quality additional as the council of said Village within the said period of five years, may from time to time direct; any such additional lamps to those now in use in said village to be placed wherever the Council may direct within the limits of said village, said lamps when so placed to continue in use until the end of said period of five years from the date this ordinance goes into effect and all of said lamps to burn all night and each and every night of the year, and said lamps shall be placed, lighted, extinguished and kept in repair by and at the expense of said D. I. Rennekar.

The said D. I. Rennekar shall also place and keep in repair at his expense in the streets of said village at places to be designated by the Council, not less than three red lights of the same candle power as those used at Wooster, Ohio, for the same purpose, to be operated from the telephone exchange and used for police purposes, the same to be furnished free of any charge.

Section 2. The Village of Orrville, by its Council, agrees in consideration of the faithful performance by D. I Rennekar, of the conditions set forth in section 1 of this ordinance to be by it performed, to pay the said D. I. Rennekar for the said lights as follows: A price equal to seventy (70) dollars per year for each and every 2,000 candle power lamp (arc lamps) if the total number of lamps does not exceed fifty, a price equal to sixty seven (67) dollars per [fol. 249] year for each and every 2,000 candle power lamp (arc lamps) if the total exceeds fifty and does not exceed sixty; a price equal to sixty-four (64) dollars per year for each and every 2,000 candle power lamp (arc light) if the total exceeds sixty and does not exceed seventy; a price of fifty-nine (59) dollars per year for each and every 2,000

candle power lamp (arc light) if the total exceeds seventy and does not exceed eighty; a price equal to fifty four (54) dollars per year for each and every 2,000 candle power lamp (arc light) if the total exceeds eighty and does not exceed ninety; a price equal to forty nine (49) dollars per year for each and every 2,000 candle power lamp (arc light) if the total exceeds ninety, the same to be paid monthly and for a period of five years from the date this ordinance shall go into effect, and the total number of lamps to be not less than thirty-two (32) for the full period of five years and as many more as the Council may from time to time direct said D. I. Rennekar to place; the said additional lamps so placed to continue in use from the time they are so placed until the end of the period aforesaid.

Section 3. The privileges hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of the said D. I. Rennekar, to perform any of the conditions hereby imposed, where such failures are occasioned by accident untoward events or the want of necessary repairs to the machinery or apparatus of said electric light plant, provided such accidents be remedied and repairs made within a reasonable time and a pro rata reduction to be made to said Village of Orrville for any loss of lighting occasioned thereby.

Section 4. Said D. I. Rennekar shall furnish light for full commerical lighting in said village, to the citizens thereof, at a price not to exceed seven and one-half cents per kilowatt hour meter rate.

Section 5. Said D. I. Rennekar shall accept this ordinance and notify the council in writing of such acceptance within ten days of the passage thereof, which acceptance, together with this ordinance shall constitute a contract, otherwise the Village of Orrville shall be no longer bound thereby and this ordinance shall be void.

Section 6. This ordinance shall take effect and be in force [fol. 250] from and after the earliest period allowed by law, and after its acceptance and legal publication.

Passed March 12, 1910.

F. E. Wolfe, Clerk. A. J. Heller, Mayor.

Proof of Publication

THE STATE OF OHIO,
Wayne County, ss:

P. E. Kriebel Manager of The Orrville Courier a newspaper of general circulation within said Wayne County, being duly sworn, deposeth and sayeth that the notice of which the annexed is a copy, was published in said newspaper 2 consecutive weeks, commencing on the 15 day of March 1910.

P. E. Kriebel.

Pub. Charges, \$19.00; afficavit, .25; total, \$19.25.

Sworn to and subscribed before me this 4th day of April, 1910. Levi Brenneman, Notary Public.
(Notarial Seal.)

(The same as above printed and pasted on page 276.)

[fol. 251] Vol. 5 of the Council Record, Page 276

Minutes of Called Meeting Held March 12, A. D. 1910

Mayor Heller presiding.

Members present were Higgins, Shantz, Koehler, Frazier, King. Absent: Kroph.

O. L., H. & Power Ordinance

Orrville Light, Heat & Power Co. Ordinance.

Moved by ———, Sec. by King, that the ordinance be received and passed to its first reading.

Ayes: All. Nays: None. Motion carried.

Moved by King, Sec. by Shantz, that the rules be suspended, further reading be dispensed with, and ordinance passed to its second reading.

Ayes: All. Nays: None. Motion carried.

Moved by King, Sec. by Higgins, that the ordinance be adopted as read.

Ayes: All. Nays: None. Motion carried.

Vol. 6 of the Council Record, Page- 238, 242 to 243

Minutes of Regular Meeting Held July 21, 1913

Mayor Willaman presiding.

Members present: Leickheim, Seas, Harbridge, Reed, Zell. Absent: Waite.

Electric Plant Resolution

Reading of resolution declaring it necessary to issue bonds for the purpose of purchasing, housing, erecting, and installing machinery, poles, wires, and appliances necessary or desirable for the operation of an electric lighting and power plant in the sum of forty-one thousand dollars, \$41,000.00, and that the question of issuing and selling the bonds of said village be submitted to vote of the qualified electors of said village at a special election to be held in [fol. 252] said village on Tuesday, August 26th, 1913.

Moved by Reed, seconded by Seas, that the resolution be accepted as read and passed to the first reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Naves: None. Motion carried.

Moved by Seas, sec. by Harbridge, that the rules be suspended, further reading dispensed with, and the resolution passed to the second reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Naves: None. Motion carried.

Moved by Leickheim, sec. by Harveridge, that the rules be suspended, further reading dispensed with, and the resolution passed to the third reading.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Naves: None. Motion carried.

Moved by Reed, sec. by Leickheim, that the rules be suspended, further reading dispensed with, and the resolution be adopted as read.

Ayes: Leickheim, Seas, Harbridge, Reed, Zell. Naves: None. Motion carried.

[fol. 253] Vol. 5 of the Ordinance Records, Page- 136, 137,
150, 153, 166

Nov. 17, 1913.

An ordinance to issue bonds for the purpose of purchasing, housing, erecting, and installing machinery, poles, wires, and appliances necessary or proper for the operation of an electric-lighting and power plant.

Whereas at a special election held for that purpose on the 26th day of August 1913 the question of issuing the bonds of said village in an amount in excess of (1) per cent of the total value of all property in such village as listed or assessed for taxation that is, in the sum of forth one thousand dollars, \$41,000.00 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or proper, for the operation of an electric lighting and power plant, was submitted to a vote of the qualified electors of said village, and,

Whereas two-thirds of the voters voting at such election upon the question of issuing said bonds voted in favor thereof, now therefor-,

Be it ordained by the council of the village of Orrville, State of Ohio:

Section 1. That the bonds of said village be issued in the sum of forth one thousand dollars \$41,000.00 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires, and appliances necessary or proper, for the operation of an electric lighting and power plant. Each of said bonds shall be dated January 1, 1914, and of such amounts and due at the times as follows:

TWO	2	bonds of Five hundred dollars	\$500.00 each, due	July 1, 1915
"	2	" " " " " "	" \$500.00 " "	July 1, 1916
"	2	" " " " " "	" \$500.00 " "	July 1, 1917
"	2	" " " " " "	" \$500.00 " "	July 1, 1918
"	2	" " " " " "	" \$500.00 " "	July 1, 1919
SIX	6	" " " " " "	" \$500.00 " "	July 1, 1920
"	6	" " " " " "	" \$500.00 " "	July 1, 1921
"	6	" " " " " "	" \$500.00 " "	July 1, 1922
"	6	" " " " " "	" \$500.00 " "	July 1, 1923
"	6	" " " " " "	" \$500.00 " "	July 1, 1924
EIGHT	8	" " " " " "	" \$500.00 " "	July 1, 1925
"	8	" " " " " "	" \$500.00 " "	July 1, 1926
"	8	" " " " " "	" \$500.00 " "	July 1, 1927
"	8	" " " " " "	" \$500.00 " "	July 1, 1928
TEN	10	" " " " " "	" \$500.00 " "	July 1, 1929

[fol. 254] With interest on said bonds at the rate of five per cent (5%) per annum payable semi-annually January 1st and July 1st of each year.

Section 2. Said bonds shall express upon their face the purpose for which they are issued and that they are issued in pursuance of this ordinance. They shall be prepared, issued and delivered under the direction of the finance committee of the council and the village clerk, shall be signed by the Mayor and Clerk and sealed with the corporate seal of said village and the interest coupons attached to said bonds shall be executed by the village clerk with his signature thereto, or he shall have his signature printed or lithographed thereon.

Section "2." Said bonds shall first be offered at par and accrued interest to the trustees of the sinking fund of the said village in their official capacity, and if the sinking fund trustees refuse to take any or all of said bonds at par and accrued interest, then said bonds not so taken shall be offered at par and accrued interest to the commissioners of the sinking fund of the village school district and such of said bonds as are not taken shall be advertised for public sale and sold in the manner provided by law, but not for less than their par value and accrued interest.

Section 4. The proceeds from the sale of said bonds, except the premium and accrued interest shall be placed in the village treasury to the credit of the electric light plant fund and shall be used for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or proper for the operation of an electric lighting and power plant and for no other purpose; and the premiums and accrued interest received from such sales shall be transferred to the trustees of the sinking fund, to be applied by them in the manner provided by law.

Section 5. That for the purpose of raising a fund to pay the interest upon the said bonds and to create a sinking fund to pay said bonds at maturity, the council of the village of Orrville Ohio, hereby orders and directs that an amount of money, sufficient to pay the interest on said bonds as it becomes due and to provide a fund for there redemption at maturity, be placed in the annual-budget each

[fol. 255] year and until all of said bonds and interest are paid; such amounts so placed in said annual budget shall be placed on the tax duplicate and collected by the same officials in the same manner and at the same time that the taxes for general purposes are collected, and that all funds derived from said taxes shall be placed in a separate and distinct fund, which shall be irrevocably pledged to the payment of interest and principal of said bonds as the same falls due.

Section 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

E. P. Willaman, Mayor.

Attest: A. Jenny, Clerk.

Passed November 17, 1913.

Proof of Publication

THE STATE OF OHIO,

Wayne County, ss:

I, James Higgins Manager of The Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, depose and sayeth that the notice of which the annexed is a copy, was published in said newspaper 2 consecutive weeks, commencing on the 22nd day of November, 1913.

Pub. Charges, \$21.00.

James Higgins.

Sworn to and subscribed before me this 6th day of December, 1913. N. L. Royer, Notary Public.
(Notarial Seal.)

(The same as above printed and pasted on page 153.)

[fol. 256] Vol. 5 of the Ordinance Records, Page- 136 and
-137, 150 to 153, and also Page 166

July 21, 1913.

Resolution declaring it necessary to issue bonds for the purpose of purchasing, housing, erecting, and installing machinery, poles, wires, and appliances necessary and desirable for the operation of an electric-lighting and power plant.

Be it resolved by the Council of the Village of Orrville, State of Ohio, two thirds of all the members elected thereto concurring, that it is necessary to issue and sell bonds in the fiscal year beginning January 1st 1913, for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or desirable for the operation of an electric lighting and power plant in an amount greater than one per cent of the total value of all property in said Village as listed and assessed for taxation to wit: in the sum of forty one thousand dollars \$41,000.00 and that the question of issuing and selling the bonds of said Village in excess of said one per cent, that is, in the sum aforesaid, be submitted to vote of the qualified electors of said Village at a special election to be held in said Village on Tuesday, August 26th 1913, at the regular place or places of voting in said Village and said election shall be conducted canvassed and certified in the same manner as general municipal elections.

That the Mayor be and he is hereby directed to give public notice of the time and place of said Election in the manner provided by law.

That the Clerk be and hereby is directed to certify a copy of this Resolution to the Deputy State Supervisors of Wayne Co. Ohio.

E. P. Willaman, Mayor.

Attest: A. Jenny, Clerk.

Passed July 21, 1913.

(Same as above printed and pasted on page 137.)

[fol. 257]

Proof of Publication

THE STATE OF OHIO,
Wayne County, ss:

I, Chas. F. Kraft, Editor-Manager of The Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, depose and sayeth that the notice of which the annexed is a copy, was published in said newspaper 2 consecutive weeks, commencing on the 25 day of July, 1913.

Pub. Charges, \$7.50.

Chas. F. Kraft.

Sworn to and subscribed before me this 1st day of Aug., 1913. N. L. Royer, Notary Public. (Notarial Seal.)

(Same as above printed and pasted on page 137.)

To the Deputy State Supervisors of Elections, Wayne County, Ohio:

I hereby certify that I am the duly elected, qualified and acting Clerk of the Village of Orrville, Ohio, and that the above written, is a true and accurate copy of a Resolution, adopted by the Council of the Village of Orrville, Ohio at the regular meeting July 21, 1913.

In witness whereof witness my hand and official seal this 23rd day of July, 1913.

A. Jenny, Village Clerk. (Seal.)

Legal Notice

Notice is hereby given that in pursuance of a resolution of the Council of the Village of Orrville, passed on the 21st day of July, 1913, there will be submitted to the qualified [fol. 258] electors of said village at a special election to be held in the village of Orrville on Tuesday, August 26th, 1913, the question of issuing bonds of said village in an amount in excess of one per cent of the total value of all the property in such village as listed and assessed for taxation, that is to say, in the sum of forty-one thousand dol-

lars, \$41,000.00 for the purpose of purchasing, housing, erecting and installing machinery, poles, wires and appliances, necessary or desirable, for the operation of an electric lighting and power plant.

Those who vote in favor of the proposition of issuing the bonds as aforesaid shall have written or printed on their ballots the words "For the Issue of Bonds" and those who vote against the same shall have written or printed on their ballots the words "Against the Issue of Bonds."

E. P. Willaman, Mayor.

July 21, 1913.

Proof of Publication

THE STATE OF OHIO,

Wayne County, ss:

I, J. A. Higgins, Manager of The Orrville Courier-Crescent, a newspaper of general circulation within said Wayne County, being duly sworn, depose and sayeth that the notice of which the annexed is a copy, was published in said newspaper 4 consecutive weeks, commencing on the 25th day of July, 1913.

Pub. Charges, \$7.50.

Jas. A. Higgins.

Sworn to and subscribed before me this 5th day of September, 1913. N. L. Royer, Notary Public.
(Notarial Seal.)

(Same as above printed and pasted on page 137.)

[fol. 259] Vol. 7 of the Council Record, Page- 18, 20, 21, 32
and 33

Record of Council Proceedings

Minutes of Regular Meeting Held November 17th, 1913

Mayor Willaman presiding.

Members present: Leickheim, Waite, Seas, Harbridge, Houser. Absent: Zell.

1st. Minutes of November 3rd meeting adopted as read.

• • • • •

8th. Reading of an ordinance to issue bonds for the purpose of purchasing, housing, erecting and installing, machinery, poles, wires and appliances necessary and proper for the operation of a municipal electric light and power plant.

Moved by Waite, supported by Seas, that the ordinance be accepted as read and passed to the first reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser.
Nays: None. Motion carried.

Moved by Leickheim, supported by Harbridge, that the rules be suspended, further reading dispensed with and the ordinance passed to the second reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser.
Nays: None. Motion carried.

Moved by Seas, supported by Waite, that the rules *by* suspended, further reading dispensed with, and the ordinance passed to the third reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser.
Nays: None. Motion carried.

[fol. 260] Moved by Waite, supported by Seas, that the rules *by* suspended, further reading dispensed with, and the ordinance be passed to the second reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser, Zell.
Nays: None. Motion carried.

Moved by Leickheim, supported by Waite, that the rules be suspended, further reading dispensed with, and the ordinance be passed to the third reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser, Zell.
Nays: None. Motion carried.

Moved by Waite, supported by Seas, that the rules be suspended, further reading dispensed with, and the ordinance adopted as read.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser, Zell.
Nays: None. Motion carried.

Moved by Waite, supported by Seas, that the rules be suspended, further reading dispensed with, and the ordinance be adopted as read.

Ayes: Leickheim, Seas, Waite, Harbridge, Houser.
Nays: None. Motion carried.

9th. Moved by Waite, supported by Seas, that the board of Public Affairs be instructed to figure on ornamental street lighting and install same, business section.

Ayes: All. Nays: None. Motion carried.

Record of Council Proceedings

Minutes of Adjourned Meeting Held December 29th, 1913

Council met pursuant to adjournment regular meeting December 16th, 1913.

Mayor Willaman presiding.

Members present: Leickheim, Waite, Seas, Harbridge, Houser, Zell. Absent: None.

* * * * *

[fol. 261] 2nd. Reading of an ordinance entitled "An Ordinance to Authorize an Expenditure of Forty-one thousand dollars, \$41,000.00, for purchasing, housing, erecting, and installing machinery, poles, wires, and appliances necessary and proper for the municipal electric-light plant of the village of Orrville, Ohio.

Moved by Seas, supported by Harbridge, that the ordinance be accepted as read and passed to the first reading.

Ayes: Leickheim, Waite, Seas, Harbridge, Houser, Zell. Nays: None. Motion carried.

Filed Supreme Court Sept. 30, 1924.

[fol. 262] SUPREME COURT OF OHIO

[Title omitted]

OPINION

Where the contract between a municipal corporation and an electric lighting company is silent as to the duration of the franchise such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. A municipal corporation may therefore voluntarily terminate its obligation under the contract and wholly withdraw therefrom.

(No. 18784—Decided June 2, 1925)

Error to the Court of Appeals of Wayne County

This was an action in quo warranto begun by the state of Ohio as an original action in the Court of Appeals of Wayne County, Ohio, on the relation of Joseph O. Fritz, prosecut-

ing attorney of Wayne county, asking to oust the defendant from its use of the streets of the village of Orrville for the maintenance of poles, wires, guy wires, and electrical equipment, placed therein by the defendant or its predecessors in title for the purpose of supplying electricity to the inhabitants of the village for commercial and private lighting purposes.

The plaintiff in error claimed to have the right to maintain such electrical equipment in the streets of the village for such purpose by virtue of a franchise embodied in an ordinance granted by the village upon February 1, 1892, to Aurel P. Gans and Melville D. Wilson, claimed to be the predecessors in title of plaintiff in error. The pertinent portions of the ordinance are as follows:

"That Aurel P. Gans and Melville D. Wilson, of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

By section 3 it was provided:

"In consideration of the privileges hereby granted the said Gans & Wilson, their associates, successors and assigns shall furnish the Village of Orrville on the several streets, lanes, alleys and avenues not less than twenty-five (25) electric lamps of not less than 2,000 candle power each, to be placed wherever the council may direct in said village [fol. 263] of Orrville."

Section 4 provided:

"In consideration of the construction of said electric light plant as herein provided, the council of said village of Orrville hereby agrees and binds itself to take and use the light of said Gans & Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first supplied and to pay same quarter-annually for said lighting a price equal to seventy-two (\$72) dollars per year for each and every lamp of 2,000 candle power, said lamps to be lighted

and extinguished and kept in repair by and at the expense of said Gans & Wilson, their associates, successors and assigns; the total number of lamps thus supplied to be not less than twenty-five 2,000 candle power lamps—are light.”

The ordinance also contained a provision that “the privilege hereby conferred and the obligations incurred shall not be forfeited for any temporary failure on the part of said Gans & Wilson to perform any of the conditions hereby imposed,” etc., and that Gans and Wilson agreed to notify the council in writing of their acceptance of said ordinance within 10 days from the passage thereof, “which acceptance, together with the ordinance, shall constitute a contract.”

The petition of the relator in the court below alleged that the defendant has assumed and used and is now using the said franchise rights and privileges as above enumerated; the same not having been granted to it by any lawful authority and without the consent or authority of the plaintiff, the state of Ohio, or of the said village of Orrville.

The Court of Appeals in its journal entry found upon the pleadings and the evidence that—

“The defendant, the Ohio Public Service Company, has, as alleged, exercised franchise and privilege of carrying on business in furnishing commercial and private lighting in the village of Orrville, Wayne county, Ohio, contrary to and without the authority of the laws of the State of Ohio, and contrary to and without authority from said village of Orrville.”

The case comes into this court upon petition in error, Further facts are stated in the opinion.

[fol. 264] Mr. Franklin L. Maier and Mr. C. H. Henkel for plaintiff in error.

Mr. Joseph O. Fritz, prosecuting attorney, Mr. Alton H. Etling, and Mr. L. R. Critchfield for defendant in error.

ALLEN, J.:

Throughout the course of this opinion the Ohio Public Service Company will be called the respondent, and the defendant in error will be called the relator.

The relator contended in the Court of Appeals that the respondent had been granted no franchise rights, or that, if such rights had been acquired, they had been forfeited by abandonment and nonuser. These allegations were denied by the respondent. Since the court refused to give the order of ouster upon the ground that no franchise had been given, or upon the ground of abandonment and nonuser, it is evident that the Court of Appeals must have found against the relator upon these questions of fact. There is evidence in the record to sustain this conclusion of the Court of Appeals upon those questions, and we therefore shall not discuss them, but shall pass directly to the main point of law involved in the case.

The relator contends that the respondent is using the streets of Orrville for commercial lighting purposes without the authority of the state or the village. Respondent on the other hand claims that the organization of the Orrville Light, Heat & Power Company in 1893 constituted a grant from the State of Ohio to the associates of Gans and Wilson to operate and maintain a lighting system for the village of Orrville and the inhabitants thereof, and that this grant from the state, taken together with the ordinance of February 1, 1892, created and fixed rights, which the village, as a subsidiary of the state, had no power to destroy.

To discuss these questions let us first consider the statute in force governing this situation in 1892, at the time when the franchise ordinance was obtained from the village by Gans and Wilson. At that time Section 3454, Revised Statutes, now Section 9170, General Code, and Section 3471a, Revised Statutes, now Sections 9192 and 9193, General Code, were in full force and effect. Read together, they bestowed upon electric lighting companies the general right to erect their equipment within the public highways, provided the same should not incommode the public in the use of the roads. These sections were construed in the case of [fol. 265] *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 93 Ohio St., 428, 113 N. E., 402, the first paragraph of the syllabus of which reads:

"The act of January 26, 1887 (84 O. L., 7), made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies so

far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state."

These sections, however, did not confer upon the Orrville Light, Heat & Power Company any special rights in the streets of the City of Orrville.

In the year 1896 Section 3471a, Revised Statutes, was amended (92 Ohio Laws, 205), and the amendment specifically prohibited electric companies from exercising in a municipality rights granted them under Section 3454, Revised Statutes (Section 9170, General Code), without the consent of the municipality. This amendment took effect prior to the expiration of the 10-year period established in Section 4 of the ordinance of 1892, and prior to any transfer by the Orrville Light, Heat & Power Company of its rights in the village streets. In this statute the Legislature certainly revoked whatever right had been given to public utilities to occupy streets in a municipality without the consent thereof, and, as under the Constitution the Legislature was authorized to revoke such rights theretofore granted, the revocation became effectual upon the effective date of the amendment.

The question as to whether the respondent's predecessors were acting without authority from the village in occupying the streets of Orrville for the purpose of commercial lighting did not arise for a considerable period. In 1902, at the expiration of the 10-year period established in the original ordinance, the village passed an ordinance which was duly accepted by the Orrville Light, Heat & Power Company, by which the company contracted to light the streets of the village for a period of 5 years. At the expiration of **this** 5-year period, in 1907, a similar ordinance was passed by the village, and accepted by the company, contracting with the company for the lighting of the streets of the village for another period of 5 years. During the period between 1907 and 1912 the Orrville Light, Heat & Power Company sold its assets to one D. I. Rennicker, and the village of Orrville later enacted another 5-year contract with Rennicker. [fol. 266] These contract ordinances, in distinction to the ordinance of February 1, 1892, given in the statement of facts, conferred no specially designated right to use the

streets. In other words, all of the ordinances, beginning with 1902, were contract ordinances from which the power to use the streets arose by implication only and ceased with the expiration of the contract ordinance. Before the expiration of the last-named 5-year period, in 1917, with the approval of the Public Utilities Commission, Rennicker sold out his interest in the lighting company to the Massillon Electric & Gas Company, which, in turn, in 1921, sold its assets and rights to the respondent, the Ohio Public Service Company.

Under the amendment of 1896 (92 O. L., 204), no assignee of the Orrville Light, Heat & Power Company could exercise rights in the streets of the village of Orrville without the consent of the village. This consent was given to the Orrville Light, Heat & Power Company and to its successor, Rennicker, by the village in the contract ordinances, but was never given to the Massillon Electric & Gas Company. It is true that the city acquiesced in the exercise of these rights by the Massillon Electric & Gas Company until the end of the last 5-year contract, and hence cannot attack the exercise of those rights during that period; but all of these rights ceased in 1917 at the expiration of the last 5-year contract. The Massillon Electric & Gas Company succeeded only to the rights of Rennicker, and those rights expired in 1917, and the Massillon Electric & Gas Company had thereafter no right which it could transfer to the Ohio Public Service Company under the laws of the State of Ohio. Moreover, as it was the state itself which prohibited such use of the streets of municipalities after 1896, without the consent of the village, any exercise of those rights after the expiration of the last 5-year contract in 1917 was had without the consent and authority of the state, unless the passage of the franchise ordinance in February, 1892, constituted an irrevocable consent upon the part of the village.

With regard to this point it is the contention of the relator that such rights as the respondent acquired against the village of Orrville from others, particularly such as may have been granted to Gans and Wilson by the ordinance of the village passed upon February 1, 1892, are indeterminate, existing only so long as the parties mutually agree, and that the same are terminated by an ordinance of the village passed June 18, 1923.

[fol. 267] The respondent urges that inasmuch as the ordinance passed by the village council upon February 1, 1892, granted a franchise indefinite as to time, it constituted a perpetual franchise to do the acts complained of, and could not be terminated by any act of the village.

The record shows that the ordinance of February 1, 1892, creating the franchise for the erection and maintenance of electric wire mains and apparatus in the streets of the village of Orrville, Ohio, contained no express provision as to the duration of the franchise. It also contained no express provision as to the right of the company to furnish electricity for commercial and private lighting purposes through the village streets. However, after the construction of the electric plant, electricity was actually furnished under the terms of the ordinance not only for public but for commercial and private lighting purposes.

It is a fact that in 1923 the council of the village of Orrville repealed the ordinance of 1892, ordered the respondent to remove its equipment from the streets of the village within 30 days, and notified the respondent that "all rights and privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said the Ohio Public Service Company, be and the same are hereby terminated and ended."

It is therefore evident that, in so far as it was within the power of the village so to do, it terminated and revoked the franchise of 1892.

Was the right created by the ordinance of 1892 an irrevocable franchise? We think not for the following reasons:

(1) That it was the intention of the parties that the franchise should terminate at the end of 10 years.

(2) That under the law as laid down in the case of *East Ohio Gas Co. v. City of Akron*, 81 Ohio St., 33, 90 N. E., 40, 26 L. R. A. (N. S.), 92, 18 Ann. Cas., 352, which was followed in the syllabus of the case of *East Ohio Gas Co. v. City of Cleveland*, 106 Ohio St., 489, 140 N. E., 410, the franchise is not perpetual, but indeterminate merely, existing only so long as the parties mutually agree thereto.

There are circumstances in this record which show an intention upon the part of the council in passing the ordi-

nance of February 1, 1892, to give a mere revocable right after the expiration of 10 years. Section 4 provided that—

“In consideration of the construction of said electric light [fol. 268] plant * * * the council of the said village of Orrville hereby agrees and binds itself to take and use the light of said Gans and Wilson, their associates, successors and assigns for the period of ten (10) years from and after the date upon which said light shall be first applied.
* * *,”

The right to do commercial lighting is nowhere expressly granted, and arose as an incident to the right to do public lighting, as to which the village bound itself for 10 years only to take and use the light provided by Gans and Wilson. At the conclusion of the 10 years, in 1902, the village, without referring in any way to the ordinance of 1892, or to the rights and obligations thereunder, passed an ordinance by which the Orrville Light, Heat & Power Company, one of the predecessors of the respondent herein, contracted to light the streets of the said village for a period of 5 years. This contract was fully performed by both parties. At the expiration of this contract in 1907, the village passed another ordinance by which it contracted that the same company have the lighting of the streets of the village for another period of 5 years, and fixed the price at which the company should furnish light for commercial purposes. Another 5-year franchise ordinance of similar character, not referring to the ordinance of 1892, or to any of the subsequent ordinances, was passed in 1912, to begin at the expiration of the contract of 1907, in which the price was fixed at which light for commercial lighting should be furnished to the citizens of the village. In 1917, at the expiration of the last 5-year contract referred to, the village constructed a municipal lighting plant and put the same into operation.

The record does not show that the predecessors in title of the respondent questioned the action of the village in enacting the 5-year ordinances, or claimed that none of these 5-year contracts was necessary. The use of the streets was plainly necessary for lighting the streets of the village for a period of 10 years by electricity. In view of the fact that the 10-year period was upon one of the specific price fea-

tures of the original ordinance, and that in the frequent negotiations which took place in the passage of the subsequent ordinances it was never questioned that the village had a right to enact franchise ordinances with the definite time limit upon the duration of the franchise set forth therein, we think that the parties intended that at the expiration of the 10-year period the right to sell commercial [fol. 269] lighting or light for private purposes should be subject to further contract and revocable at will.

This case upon the facts, then, need not run counter to the decision in the case of Northern Ohio Traction & Light Co. v. State of Ohio, ex rel. Pontius, 245 U. S., 574, 38 S. Ct., 196, 62 L. Ed., 481, L. R. A. 1918E, 865, for circumstances are present herein showing an intention upon the part of the parties to give and receive a mere revocable right after the expiration of the 10-year period.

This court has spoken in no uncertain terms upon the question of franchises indeterminate in duration. As laid down in the case of East Ohio Gas Co. v. City of Akron, 81 Ohio St., 33, 90 N. E., 40, 26 L. R. A. (N. S.), 92, 18 Ann. Cas., 332, the rule is that—

“Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom. * * *.”

In the East Ohio Gas Company case, *supra*, the question was whether the incorporated companies might voluntarily forfeit their right to exercise their privileges under certain franchises within the municipality. Herein the municipality seeks to oust the incorporated company. There is no logical reason why the rule announced above should apply in favor of the incorporated company and not in favor of the municipal corporation, and, in fact, this court has made that precise holding in *Village of Oak Harbor v. Oak Harbor Natural Gas Co.*, 106 Ohio St., 660, 140 N. E., 943.

As we have in this case an indeterminate franchise, concerning which it is conceded that one party to the contract

creating the franchise has decisively indicated its intention to terminate its obligation thereunder, it is evident that whatever rights the respondent had in the streets of Orrville ceased when the village terminated the right by the repealing ordinance. As the right to do private and commercial lighting was incidental to the public right, it ceased when the public right ceased, and we hold that the respondent has been exercising its rights in the street against the authority of the state and of the municipality.

The respondent further contended that, inasmuch as it [fol. 270] has been operating under recognition and approval of the Public Utilities Commission, and the Public Utilities Commission has made no order requiring it to abandon its franchise rights, it cannot be ousted under the laws of this state.

We are not impressed with the proposition that the approval and recognition of the Public Utilities Commission constitutes a judgment as to the legality of the position occupied by the respondent. If a corporation is doing business as a public utility within a municipality, without authority from the state and the municipality, the mere fact that it is recognized by a Commission which is itself a creature of the state will not validate its existence, nor deprive this court of its constitutional jurisdiction in quo warranto.

The respondent further contends that since February 1, 1892, the council of the village has recognized the right of the respondent and its predecessors in title to interest, and is now estopped to deny these rights. Upon a thorough consideration of the record we think that no estoppel has been established here. The fact that the council of Orrville repeatedly gave 5-year contracts to the successors of the original grantees is inconsistent with recognition upon its part that the right granted in the original ordinance was perpetual. Accordingly this contention also will be overruled.

For the above reasons the decision of the Court of Appeals will be affirmed.

Judgment affirmed.

Marshall, C. J., Matthias, Day, Kinkade and Robinson, JJ., concur.

[fol. 271] Reporter's certificate to foregoing paper omitted in printing.

[fol. 272] Certificate of lodgment omitted in printing.

[fol. 273] Certificate to foregoing transcript omitted in printing.

[fol. 274] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
BY PLAINTIFF IN ERROR TO PRINT THE ENTIRE RECORD—
Filed September 11, 1925

1. That the Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Wayne County, Ohio, and in refusing to reverse said judgment and remand this cause to said Court for further proceedings.

2. That said judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, for the reason that it impairs the obligation of the contract between the plaintiff in error and the State of Ohio.

3. That said judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 10 of Article I of the Constitution of the United States of America, for the reason that it impairs the obligation of the contract between the plaintiff in error and the Village of Orrville.

[fol. 275] 4. That the judgment of the Supreme Court of the State of Ohio in this cause is in violation of and repugnant to Section 1 of the 14th Amendment to the Constitution of the United States as it deprives the plaintiff in error of its property without due process of law.

5. That the Supreme Court of the State of Ohio erred in holding as follows, to wit:

a. That the franchises, rights and grants of the plaintiff in error and its predecessors in title acquired under an Act of the Legislature of the State of Ohio passed on the 26th

day of January, 1887, were revoked, annulled and cancelled by the Act of said Legislature passed on the 21st day of April, 1896.

b. In holding that the franchises, grants and rights of the plaintiff in error and predecessors in title to distribute electricity in said Village of Orrville, Ohio, were revoked, annulled and cancelled by the passage of a resolution and ordinance by the said Village passed by the Council on the 18th day of June, 1923, under authority of the provisions of said Act of April 21, 1896.

c. In holding that the franchises, grants and rights of plaintiff in error acquired from the State of Ohio under said Act of the Legislature of said State, passed January 26, 1887, above referred to, and the amendments thereto, were revoked, annulled and cancelled by the Act of the Legislature of said State passed on the 21st day of April, 1896, and above referred to, and further, in holding that said Act of April 21, 1896, conferred upon the Council of the Village of Orrville authority to cancel and annul said franchises, grants and rights of the plaintiff in error by the passage of a resolution and ordinance on June 18, 1923.

d. In rendering said final judgment in that it impaired the obligation of the contract made between the State of Ohio and the Orrville Light, Heat & Power Company, the [fol. 276] predecessor in title to the plaintiff in error under and pursuant to said Act of January 26, 1887, granting to said company the franchise and right to use the public streets of the Village of Orrville for the transaction of the business for which it was incorporated to furnish electric light, heat and power to said Village and its inhabitants, and the consent and agreement by the authorities of the Village of Orrville, Ohio, as expressed in the ordinance of February 1, 1892, relative to the mode and manner of the use of the streets, alleys, lanes, square and public places in said Village by the equipment necessary for said service, which contract, grant, franchise and right was acquired for a valuable consideration by plaintiff in error in 1921, and is now owned by the plaintiff in error.

e. In interpreting said Act of April 21, 1896, as revoking and annulling the grants, franchises and rights granted by the State of Ohio to the plaintiff in error and to the Orrville Light, Heat & Power Company under the provisions

of the Act of said Legislature passed January 26, 1887, as such interpretation is in conflict with and contrary to a previous interpretation of said Act by the said Supreme Court of the State of Ohio in the case pending therein entitled "The Hardin-Wyandot Lighting Company vs. Village of Upper Sandusky," 93 O. S., 428, decided February 15, 1916, by said Court, and which decision was affirmed by the Supreme Court of the United States on December 15, 1919 (251 U. S., 173), in that the plaintiff in error, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electrical plant in the Village of Orrville, and said franchise, grant and right, of said Orrville Light, Heat & Power Company.

f. In interpreting said Act of April 21, 1896, as giving [fol. 277] authority to the Village of Orrville to cancel, revoke and annul by the passage of said resolution and said ordinance, by its Council, on June 18, 1923, the contract, rights and franchises of the plaintiff in error, and of its predecessor in title, The Orrville Light, Heat & Power Company, granted by the State of Ohio under the Act of January 26th, 1887, such interpretation being contrary to and in conflict with the former decision of the said Supreme Court of the State of Ohio in the case of The Hardin-Wyandot Lighting Company vs. The Village of Upper Sandusky, above referred to, in that the plaintiff in error, relying upon said former interpretation and its affirmance by the Supreme Court of the United States, did on or about the 29th day of October, 1921, purchase said electric plant in the Village of Orrville, and said franchises, grants and rights of said The Orrville Light, Heat & Power Company.

g. In refusing to hold and decide that the Act of the Legislature of the State of Ohio passed on the 21st day of April, 1896, impaired the obligation of the contract, namely, the franchise, grant and right of plaintiff in error acquired from the State of Ohio under Act of the Legislature of said State passed January 26, 1887.

h. In refusing to hold and decide that the ordinance and resolution of said Village of Orrville passed by the Council thereof on the 18th day of June, 1923, impaired the obligations of the contract, namely, the franchises, grants and rights of the plaintiff in error, acquired from the State of

Ohio under Act of the Legislature of said State passed January 26, 1887.

i. In refusing to hold and decide that the ordinance and resolution of the Village of Orrville passed by its council on the 18th day of June, 1923, impaired the obligation of a contract, namely, the franchise, grant and right of the plaintiff in error acquired from the Village of Orrville un-[fol. 278] der the ordinance passed by the Council of said Village on February 1, 1892.

All in violation of and in conflict with the provisions of Section 10 of Article I of the Constitution of the United States, and of Section 1, Article 14, of the Amendments thereto.

Ohio Statutes Involved

1. Sections 3454 to 3471 of the Revised Statutes of Ohio (General Code Sections 9170-9191, inclusive), relating to magnetic telegraph and telephone companies.

2. An Act of the Legislature of the State of Ohio passed January 26, 1887, entitled "An Act to supplement Sections from 3454 to 3471, inclusive, Revised Statutes of Ohio, 84 O. L., page 7.

3. An Act of the Legislature of the State of Ohio passed on the 21st day of April, 1896, entitled "An Act to Amend Section 3471-a of the Revised Statutes of Ohio (92 O. L., 204, General Code Sections 9192 and 9194, inclusive.)

[fol. 279] The record filed in this cause shows the following salient and controlling facts:

On February 1, 1892, the Village of Orrville, Ohio, passed an ordinance granting to Gans and Wilson, their associates, successors and assigns, the right and power to use the streets, alleys, lanes and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus, complete for the distribution of electricity for light, heat and power, and that in accordance with said grant the grantees erected and operated an electric light plant in the Village of Orrville for the distribution of electricity for said purposes, and they and their associates, successors and assigns continued to operate said electric light plant in said Village

until January 3, 1893, when they formed, under the laws of the State of Ohio, a corporation entitled "The Orrville Light Heat & Power Company" for the purpose of manufacturing and selling electricity in the Village of Orrville, Ohio; that said company, after its organization acquired the property and rights of the former owners of said plant.

That the plaintiff in error is a public service corporation created and organized on October 11, 1921, under the laws of the State of Ohio, for the purpose, among other things, of furnishing, transporting and distributing to public and private buildings, avenues, lanes, squares and public places, electric light, power and energy for light, heat and power in the several municipalities, counties and governmental subdivisions of the State of Ohio.

That the plaintiff in error on or about the 29th day of October, 1921, purchased said electrical plant in the Village of Orrville, and all of said franchises, grants and rights of the Orrville Light, Heat & Power Company.

That the said Orrville Light, Heat & Power Company [fols. 280 & 281] and its successors and assigns, including the plaintiff in error, continued to maintain and operate said electric lighting plant in the streets, alleys, lanes and public places of said village of Orrville, and to furnish electricity for street lighting and for commercial and residential purposes in said village, with the consent and agreement of the municipal authorities thereof.

June 18, 1923, the Council of the Village of Orrville passed an ordinance repealing the granting ordinance of February 1, 1892, and also a resolution reading as follows:

Section 1. That all rights, privileges and franchises granted to said Gans and Wilson, their associates, successors and assigns, including said The Ohio Public Service Company, be and the same are hereby terminated and ended.

Section 2. That the said Ohio Public Service Company is hereby notified to remove all their poles, wires, guywires, cross-arms, insulators and other electrical equipment now occupying the streets, lanes, alleys, avenues and public places of said Village of Orrville, Ohio, within thirty days from the receipt of a copy of this resolution.

Section 3. That a copy of this resolution be served upon said The Ohio Public Service Company by the Mayor of said Village of Orrville.

Plaintiff in error designates and requests to be printed all of the record as certified to this court, including the opinion of the Supreme Court of Ohio in said action.

C. H. Henkel and Franklin L. Maier, Attorneys for
Plaintiff in Error. Of Counsel: Frank M. Cobb,
William C. Boyle.

Defendant in error acknowledges receipt of a copy of the above statement this 10th day of September, 1925.

State of Ohio ex rel. Joseph O. Fritz, Prosecuting
Attorney of Wayne County, Ohio, by Joseph O.
Fritz, Prosecuting Attorney.

[fol. 282] [File endorsement omitted.]

Endorsed on cover: File No. 31,433. Ohio Supreme Court. Term No. 210. The Ohio Public Service Company, plaintiff in error, vs. The State of Ohio ex rel. Joseph O. Fritz, prosecuting attorney of Wayne County, Ohio. Filed August 27th, 1925. File No. 31,433.